IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1910

CHAS. WEST, Attorney General of Oklahoma,
Appellant,
v.
THE KANSAS NATURAL GAS COMPANY, THE MARNET MINING COMPANY and A. W. LEWIS,
Appellees.

No. 916

ON APPEAL FROM CIRCUIT COURT FOR WESTERN DISTRICT OF OKLAHOMA.

Brief of Appellant

CHARLES WEST,
Attorney General of Oklahoma,
For the Appellant.

CHARLES B. AMES,
Of Counsel.

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BRIEF OF APPELLANT.

I. ABSTRACT.

QUESTIONS INVOLVED.

Bills in the Circuit Court of the United States for the Eastern District of Oklahoma on the 2nd day of January, 1909, were filed by the Kansas Natural Gas Co., The Marnet Mining Co., and A. W. Lewis separately but simultaneously, against Chas. N. Haskell, the Governor, Chas. West, the At-

torney General, and other officials of the State of Oklahoma (Record, pp. 1, 34, 68).

It was stipulated between the parties (p. 141 rec.) that the record on appeal to this court should consist of the bills, answer of defendant Chas. West, stipulations as to consolidation, appeal, etc., order for consolidation and hearing, the final decree, and such further proceedings thereafter as might be taken; therefore, the filing of the demurrers, and the orders and opinion thereon are omitted.

The amended answers of defendant Chas. West were filed separately but simultaneously February 1, 1911 (pp. 106, 114 and 123 of record).

It was stipulated (p. 104 record) February 1, 1911, that the three causes should be consolidated, that the three causes should be submitted to the trial court and upon the bills and the separate answer of defendant West, and that

This defendant (p. 105 record) *it was agreed* might be allowed to appeal to this court, and any final decision and judgment upon the merits in said causes should have the same effect upon all of said defendants as if all had appealed.

Decree was entered February 1, 1911 (p. 133 of record).

The trial being on bill and answer we state the undenied portions of the bills and the affirmative allegations of the answer, as follows:

THE ALLEGATIONS OF THE KANSAS NATURAL BILL AND ANSWER.

The First paragraph of the bill is admitted by the answer. It alleges that the complainant is a corporate citizen of the State of Delaware.

The Second paragraph of the bill is admitted by the answer. It alleges that Chas. N. Haskell, the Governor, and Chas. West, Attorney General, and other defendants are various officers in the State of Oklahoma and citizens of that state; that the Governor is a citizen of the Eastern District of the State.

The Third paragraph of the bill is admitted in the answer. We set out its allegations in full (page 2 record):

> "Third. That in, under and beneath the surface of large tracts of land in the state of Oklahoma, and particularly in the county of Washington therein, natural gas has been discovered, and for more than four years last past has been known to exist in large quantities and of great value for use in the production of light, heat and power, and for all other purposes for which it is adapted or can be used, and during such time has attracted the attention of persons having capital and desirous of investing the same in mining and drilling for, procuring, utilizing and otherwise disposing of such natural gas for the purposes hereinbefore set forth, and that since such discovery of gas as aforesaid and in the counties of Washington, Tulsa, Wagoner, Muskogee, Creek, Nowata, Craig, Mayes, Rogers, and Okmulgee,

Oklahoma, and particularly in the said county of Washington, a very large number of natural gas wells have been drilled and equipped, in the drilling of which, and in the locating and development of the said gas fields, large sums of money aggregating over a million dollars, have been expended, and large numbers of laborers, both skilled and unskilled, have been and now are actively employed."

The fourth paragraph of the bill is denied by the answer. The effect of the denial is to traverse the statements as to supply in Oklahoma and demand in Oklahoma.

The allegations of the answer as to this paragraph are as follows (pages 106-107 record):

"Fourth. I deny that there have been drilled four hundred (400) gas wells in the state of Oklahoma, capable of furnishing over one billion and a half (1,500,000,000) cubic feet of gas per day, and aver that there are in the State of Oklahoma two hundred and seventy-three (273) commercial gas wells, having a total potential volume of 1,225,000,000 cubic feet per day, as hereinafter more fully stated, but deny that said wells last named are capable of furnishing the amount last named from day to day for anything but a very short period as hereinafter more fully stated.

"I admit that certain gas wells have been capped and shut in, but deny that the gas therein has thereby been preserved for sale or consumption or otherwise. I deny that the cities and towns and people in and near the gas belt have been adequately supplied with gas, and deny that all persons in said cities desiring to use gas have been or are now being fully supplied and deny that the cities of Oklahoma, which practically might be supplied with gas have been so supplied, and deny that there

is any surplus of gas over and above the present demands therefor in said state.

"I deny that the total consumption within the State of Oklahoma will not exceed 50,000,000 cubic feet per day, but aver that the total daily consumption is approximately two hundred fifteen million (215,000,000) cubic feet per day, which amount would be greatly and continually increased except for the fact that the production is not sufficient to supply the demand.

"I deny that there are in the County of Washington one hundred fifty (150) wells capable of producing and delivering 750,000,000 cubic feet per day, which are not in use, and deny that there are now wells in said State ready for use shut in and not used, by reason of the production of gas in the gas belt exceeding the demand therefor, and aver that the legitimate demands for gas in said State exceed the production therein."

The Fifth paragraph of the bill was denied by the answer. The statements of the answer are as follows (page 107 to 110 of the record):

"Fifth. I admit that there are plants in the cities named in the fifth paragraph of the Bill equipped for the distribution of natural gas and that some of these plants were originally constructed for the manufacture and distribution of artificial gas, but the distribution of natural gas and artificial gas, is conducted through similar plants with the exception of the manufacturing machinery, and when an artificial gas plant is converted into a natural gas plant, it results in small waste of investment and where the use of natural gas is discontinued the use of artificial gas can be resumed without great expense.

"I deny that the inhabitants of said cities are

wholly dependent upon natural gas. I admit that the complainant has constructed a system of pipe lines in the various parts of the State of Kansas, and that it has a market for natural gas in said State and in the State of Missouri.

"I admit that there is now a shortage of gas in the State of Kansas and aver that said shortage has been largely caused by the transportation of gas by the complainant and others from the gas fields into the larger cities of Kansas and Missouri, and that such transportation has seriously impaired the life and value of the Kansas natural gas supply.

"I believe that if the complainant is permitted to extend its pipe lines over the highways into the State of Oklahoma, that the Oklahoma natural gas supply will be exhausted in a very few years, whereas, if it is retained and preserved for the use of the people of the State, it will last for many years longer.

"There have been many wells drilled in the State of Oklahoma having an initial capacity of from one to ten million feet per day which have within one to three years declined to a daily capacity of approximately 100,000 feet per day, and I aver that while the present daily capacity of the gas wells of the state is approximately one and a quarter billion feet per day, that the present daily consumption is more than can be safely taken from said wells without rapidly destroying their efficiency and depleting this great natural resource of the State.

"I am informed and believe, and upon such information state the fact to be that the entire gas area of the State of Oklahoma is found in oil producing sand and that the experience of all other natural gas fields demonstrates that the gas found in and taken from such sand is of much shorter duration than that found in a purely gas sand, and that on account of the nature of

Oklahoma sand in which gas is found, I believe that if the complainant and others are permitted to pipe gas from such fields to the cities mentioned in the Bill of Complaint, that the fields will be exhausted in a very short while.

"That the allegation contained herein to the effect that in Oklahoma gas and oil are found in the same sand, is subject to this exception:

"That in the Copan Field gas is found 150 to 170 feet below the oil sand, and in the Hogshooter Field gas is found 120 feet below the oil sand. That if all the wells which are drilled to the gas sand were cased below the oil sand, or packed, there would be no drainage from the gas sand into the oil wells and thence out into the air, by reason of being adjacent to oil development, but that many wells in those fields are cased above the oil sand and have no packer below it so that the gas from the lower strata escapes into the oil producing sand and eventually into the air, and the effect and consequence is as if oil and gas were in the same sands.

"Also, that it is possible that in other places, for a very limited extent, there may be a gas sand that does not produce oil, but if the same occurs it is in the immediate neighborhood to sands that do produce oil. That the only known instance at the present time is in Sections 24 and 25 in the Osage Nation, where Messrs. Miler, Rider & Black have drilled a well to the Bartlesville sand, which is an oil producing sand, but in that case the well turned out to be not an oil well, but a large gas well. A very short distance from this well a well was drilled through the Bartlesville sand to the Mississippi lime strata; that the Mississippi lime strata is generally regarded as a strictly gas sand and not an oil sand, yet in this instance last named, the well that passed through the Bartlesville oil sand to the Missis-

sippi lime sand, turned out to be an oil well and not a gas well, and several more wells in the same locality were drilled with the same result, so that in theory the Mississippi lime is a gas and not an oil sand, and in theory the sand in a portion of the Copan field and the Hogshooter field is gas and not oil; but in practice actually and in truth, it is true that all of the sand in Oklahoma which produces gas at the same time produces oil, and connects or is adjacent to sands producing oil.

"I am further informed and believe, and upon said information state the fact to be, that while the natural gas of the State of Oklahoma is found in a gas and oil producing sand, extending underneath large contiguous areas of land and that every well reaching into said gas sand takes from this unbroken area and thereby diminishes the producing capacity of any other well and of the entire field, and that if the complainant is allowed to transport gas from such fields through the new pipe lines constructed over and across the highways of the State, that it will thereby greatly damage and injure the entire field which it reaches, and injuriously affect and take the property of all other owners of gas in said field, and that the act of the legislature of the State of Oklahoma alleged by the bill to be unconstitutional, was an effort on the part of the Legislature of the State to preserve the natural gas field of the State from distributive waste.

"That all cities in Oklahoma which, by reason of their proximity to the gas fields, should reasonably be furnished with natural gas are not now supplied with such gas, and will never be so supplied if plaintiff is allowed to transport gas from Oklahoma without regulation by laws of Oklahoma; that the population of Oklahoma is now approximately 1,750,000, and its population is growing more rapidly than that of any other State in the Union; that it has a large number of rapidly

growing cities and towns, and that all kinds of industry is developing with great speed in Oklahoma. That, because of its generally prairie character, said State is entirely without a domestic fuel except coal and natural gas, and that its supply of coal is growing rapidly more costly to produce because of the peculiar nature of the Oklahoma mines—their great depth, bad floors and ceilings, bad inclines, great dryness and presence of noxious and dangerous gases; that the petroleum oil produced in the State is practically all of it transported outside the State before being refined, and that substantially the only natural practical usable fuel both for domestic and industrial use is natural gas. That many of the most promising cities, such as Enid, El Reno, Lawton, Chickasha, McAlester, as well as many scores of smaller places capable, willing and anxious to obtain and use natural gas, are now without the same altogether. That, in case the kind of pipe line proposed by plaintiff is constructed, no further development of the natural gas business in the State, so far as the supply of cities not now obtaining the same, will in reason be accomplished, and because of the relative smallness of the present lines to Oklahoma City, Guthrie and Shawnee, compared to plaintiff's proposed lines, will in the immediate future leave said cities without natural gas. That, because plaintiff may, outside the State of Oklahoma, erect enormous pumping stations, which they are now actually in the process of constructing, they might reasonably and would inevitably render entirely useless all the present lines in Oklahoma, and take away from the towns and cities of Oklahoma the entire practical use of their sole and natural fuel, because when gas is removed by the limited, prudent and natural rock pressure the nature and formation of the gas and oil sand is not radically changed, but if large pumps to pump out the wells out of proportion to the rock pressure are used, as are now actually threatened by

the plaintiff, the gas and oil sand is actually broken down as though shot with dynamite or other violence, and the salt water thereunder, always to be found, at once drowns out the wells, where rock pressure has been too greatly or rapidly decreased. That the use of the highways is a portion of the public property and the same should be confined to those who supply all alike who may seek to be served; that, because of its nature and extent, and because the enormous amount of capital needed to make practical investments tends to create monopolies, the business of gas transportation is a public business in interstate trade, over which Congress has never legislated, and interstate trade, and that to permit plaintiff to carry out its said attempt and intent to monopolize the natural gas of the State and transport it away without regulation by the State laws over and across the State's highways, without the State's consent, would be to devote public property to private and exclusive use against the principles of the Constitution of this State and the United States, and deprive the intending purchasers of natural gas in this State from all supply whatsoever.

"The developed gas belt of the State lies principally within Osage, Washington, Nowata and Rogers counties.

"The city of Bartlesville and the towns of the northern portion of the State, adjacent to the gas belt, are now supplied from the gas found in the northern part of said gas area, but the lines gathering the same are continually being extended southerly; that the city of Tulsa and adjacent cities are supplied from the central portion of said field, and that its gathering lines are likewise continually, from time to time, being extended both north and south.

"That the cities of Muskogee, Oklahoma City, Guth-

rie, Shawnee and other towns situated in the center of the State of Oklahoma and situated south, southeast and southwest of said gas fields, are being supplied from the southern portion of said fields, but the lines supplying the same are continually and from time to time extended northerly.

"Respondent further avers that there are several other pipe line companies seeking to carry on business in the State in the same manner as desired by complainant, and if it is determined that the right exists in the complainant, such determination will likewise apply to all other foreign corporations seeking to engage in a like business ,and that the complainant and such other foreign corporations as extend their lines into the State will commence taking gas in the northern and northeastern part of said field, and as they exhaust the wells in their immediate vicinity, will extend their lines in a southerly and southwesterly direction, while the pipe lines now supplying the cities and towns of the State, as they exhaust the wells closest to them, will extend their lines as above described so that at once, or in a very short time, the lines of the complainant and the other foreign corporations, and lines now existing in the State, will meet in the center of the field, and result in the speedy destruction of the supply of gas in the State, and the lines now supplying the cities and towns of the State, by reason of these facts, will extend their lines further and will have the value of their present property destroyed."

The Fifth paragraph of the bill alleged that the complainant desired to supply gas plants in St. Joseph, Kansas City, Joplin, Carthage and other cities in the State of Missouri, and the cities of Wichita, Hutchinson, Winfield, Arkansas City, Topeka, Lawrence, Leavenworth, Atchison,

Kansas City, Ottawa, Independence, Caney and other cities in Kansas.

The Sixth paragraph of the bill is admitted by the answer, to the effect that the complainant is in the market for and is willing to take and buy large quantities of natural gas for transportation by it to the several cities of Kansas and Missouri along its trunk and branch lines, supplied by it with natural gas, and there to be distributed and sold.

The Seventh paragraph of the bill is denied by the answer (p. 110 of the record).

The Eighth, Ninth and the Tenth paragraphs of the bill are admitted by the answer. The effect of the Eighth, Ninth and Tenth paragraphs are (p. 5 of the record) that the complainant has contracts with owners of land in Oklahoma under which lands natural gas exists, to buy the production of their wells, the delivery to be made at the mouth of the wells, together with a right of way to the mouth of the wells.

The Eleventh paragraph of the bill alleged that it was the purpose of the complainant to construct its pipe lines from the place where it was in Kansas to the wells of the parties in Oklahoma with whom it had made contracts set out in the preceding paragraph. And, further, it was alleged (p. 6, record) that

"Said pipe line will be used by it wholly and solely

for the transportation and carriage of natural gas from gas wells in the State of Oklahoma into the State of Kansas, and not in any way for local traffic in the State of Oklahoma, and that your orator will conduct and carry on no local traffic in the State of Oklahoma, and that your orator will conduct and carry on no local traffic or business of any nature whatsoever within the State of Oklahoma."

The Eleventh paragraph of the answer alleged that the defendant was not informed that the purposes and intentions of the plaintiffs are other than those alleged by it, but admits that the plaintiff is not endeavoring to supply the demand for natural gas in the State of Oklahoma.

The Twelfth paragraph of the bill is admitted by the answer. In the Twelfth paragraph of the bill it was alleged that the total cost of complainant's proposed line would aggregate $100,000.

In the Thirteenth paragraph of the bill the complainant set out that transportation of natural gas by means of and through pipe lines has been extensively carried on in Canada, New York, West Virginia, Ohio, Kentucky, Illinois, Missouri, Kansas, Oklahoma, Texas, Arkansas, Louisiana and other States. Other allegations were contained there, and as to the whole paragraph the defendant's answer was as follows (p. 111, record):

"Thirteenth. This defendant admits that the transportation of natural gas by means of pipe lines has been and is now extensively carried on in the States

named in the Thirteenth paragraph of the bill, but he is not informed as to the number of mileage of said pipe lines. He admits that the same has grown into a great industry and admits that millions of dollars are invested therein; and he admits that the transportation by pipe lines is the only method of transportation now usually availed of, but this fact is due to the cheapness of transportation by such means as compared to any other kind of transportation and the competition is thus restricted at this time to transportation of natural gas by pipe lines in that transportation by any other means at the present rate of transportation would not in most instances place the commodity in the market at a price sufficiently low to meet competition with coal, oil and other fuel products, and that the restriction to pipe lines is therefore caused by the cheap price at which oil and coal is now upon the market, as well as the cheapness with which natural gas may be transported from other places to any market, and this respondent respectfully avers that the highways of Oklahoma are open to the transportation of natural gas by any means or method which does not make a permanent appropriation of any part of the highways by placing a plant in the same and that nothing in the laws of Oklahoma, nor the acts of this respondent, nor purposed by him, in any way interferes or hinders the transportation of natural gas by any proper highway use without placing a plant in the same."

The Fourteenth paragraph of the bill made certain allegations as to the existence of pipe lines and the knowledge and consent of the respondents thereto. This was answered by the Fourteenth paragraph of the answer, as follows (pages 111 and 112, record):

"Fourteenth. This defendant admits that there is

now laid, maintained and operated in the State of Oklahoma, natural gas pipe lines, the extended mileage of which is unknown to the respondent, but they are in daily use for the transportation of gas within the State. He admits that said lines, in very many instances, and often at great length, run over, along and across the public highways of the State; that the same are operated without hurt, hindrance, damage or inconvenience to the traveling public or to abutting property owners, but he denies that they were laid with the knowledge and consent of the defendant, and avers that they were laid and operated according to the laws in force at the time and pursuant to the laws of the State of Oklahoma, and that, to the knowledge of defendant, there is one line daily operated for the transportation of natural gas from the State of Oklahoma into the State of Kansas, to-wit:, the line owned by Charles Owen, transporting gas from a portion of Washington County to the State of Kansas, and this respondent avers that the same was laid before the 16th day of November, 1907; and after this respondent became Attorney General of the State of Oklahoma on the 16th day of November, 1907 that he endeavored by proper suit and action to require the said pipe line to be maintained and operated in accordance with the laws of Oklahoma, and that, by a proper compromise and agreement entered in said cause, any further laying, operating or maintenance of said line in the State of Oklahoma was discontinued, except that the then existing business of said line was agreed and allowed to be continued as it then sought, because of the claim made by the said Charles Owen in said action, that the said line was rightfully laid and operated under authority received before the 16th day of November, 1907, from the government of the United States, in what was then the Indian Territory, and that said agreement was entered in said cause because of the fact that it was then a

moot question, undecided by the courts, whether a gas pipe line laid before statehood, under authority from the Secretary of the Interior, might thereafter be operative in the State of Oklahoma, and this respondent denies that he has ever consented to the violation of any of the laws of the State of Oklahoma, with reference to gas pipe lines.

"I admit that a branch from the line running to Oklahoma City was constructed to Shawnee, and a like branch from said line to Guthrie since November 16, 1907, but aver that they were so constructed pursuant to the laws then in force in the State, so far as I am informed."

In the Fifteenth paragraph of the bill the plaintiff alleged that he proposed to construct his pipe line over and across certain highways as pipe lines are now laid; that the line will be of steel pipe, so as to prevent leakage.

As to it, the defendant answered in the Fifteenth paragraph of the answer (p. 112, record):

"That he has no information as to the purposes of the plaintiff in the construction of its line except that it proposes to lay its pipe line to a depth of three feet or more under the surface of any highway it may cross."

The Sixteenth paragraph of the bill contained allegations as to past facts and future purposes of this defendant, which were denied by the answer, except in so far as special admissions were therein made. They are contained in the Sixteenth paragraph of the answer:

"Sixteenth. This respondent admits that, by vir-

tue of his office under the constitution and laws of the State of Oklahoma, he is clothed with power and authority, and charged with the duty of executing and enforcing the laws of the State in the protection of public rights, and particularly in respect to the execution and enforcement of the provisions of Chapter 67 of the Session Laws of the State enacted in 1907 and 1908, and other acts amendatory and supplementary thereto, insofar as the same must or shall be done by litigation, in which the State is interested, but as to his duties, that they rest solely upon himself and are not upon him in connection with or controlled by any other officer whatsoever, but he denies that, as such officer or otherwise, he has assumed or undertaken to execute or enforce said act by force of arms or otherwise, except as herein stated; and further this defendant denies that it is his purpose and intent, either avowed or otherwise, to prevent the transportation of natural gas in Oklahoma beyond the limits of the State; but he avers that he intends acting under his duty as Attorney General to prevent solely by actions in competent courts, the laying or constructing or operation of gas pipe lines in, on, under, across or along the highways of the State by the complainant or any other person not authorized so to do by the laws of Oklahoma; and this defendant denies the allegations set forth in paragraphs a, b, c and e of the Sixteenth paragraph of the bill, and as to the paragraph d therein contained, he admits that he, as such officer, caused a pipe line owned and operated by one Charles Owen to be put into the hands of a receiver, and admits that the same was done through an action commenced in the courts of Washington County, Oklahoma, by the filing of a petition, and that 'Exhibit F' is a true copy thereof. He admits that the stipulation was entered into as shown by 'Exhibit B,' and that a judgment and order was entered as therein shown, but he denies that said pipe line was

created and used wholly for the transportation and carriage of natural gas from Oklahoma to Kansas, and avers that said pipe line was being used for the transportation of natural gas from Oklahoma to Kansas, and avers that sadi pipe line was being used for the transportation of natural gas both from Oklahoma to Kansas, and between different points in the State of Oklahoma, and he denies that the petition was wickedly, cunningly and fraudulently drawn to conceal the fact that said line was engaged in interstate commerce, and he alleges that said petition was candidly and honestly framed under the statutes of the State of Oklahoma, dealing with nuisances and their abatement.

"He admits that he opposed the removal of said cause from the said court, and avers upon argument that the state court refused to remove the cause.

"He admits that, in the Federal court, he moved to remand the same to the State court, and avers that the Federal court properly and rightfully remanded the same.

"He denies that there were any vexatious delays and denies that he used any improper means to compel the decision given in said cause, and admits that defendants did consent to a decree entered in said cause on the 18th day of April, 1908, but by the terms of said decree the defendants were allowed to continue to prosecute all the rights at that time in existence in their possession, upon consent that they should not extend, expand or increase the same, and that the effect of said decision was to hold the business therein in statu quo and to hold the rights of the state in the same; that said consent was gained honestly, openly and without any fraud, for the best interest of all the parties in the action.

"That this defendant denies any other matter

stated in said paragraph of paragraph sixteen of said bill, except as above stated."

The Seventeenth paragraph of the bill is entirely denied by the answer except that it is averred that the defendant's intention is to act as he has averred in his sixteenth paragraph of his answer (page 113 of the record).

The Eighteenth paragraph of the bill alleged that, while doing the various acts alleged by the complainant, the defendant allowed other persons to violate the laws of the State.

The Eighteenth paragraph of the answer denied any knowledge of the matter set out in the Eighteenth paragraph of the bill (page 113, record).

The Nineteenth paragraph of the answer denied all matters contained in the Nineteenth paragraph of the bill, except that the amount in controversy was more than Two Thousand Dollars, exclusive of interest and costs.

The Twentieth paragraph of the bill alleged that the natural gas which the complainant purposes to purchase was very largely produced on lands owned by Indians, placed under the guardianship of the Secretary of the Interior, and that such gas was taken with the approval and consent of such Secretary of the Interior, while the Indian Territory existed, and before the State of Oklahoma was created.

As to these allegations the Twentieth paragraph of the

answer stated that a large number of persons formerly members of Indian tribes, had allotments, at this time inalienable, to whom the Secretary of the Interior occupies the office of guardian, but that said lands are rapidly becoming alienable and the guardianship of the Secretary of the Interior is rapidly being terminated; that at this time there is a larger proportion of lands that are alienable than are inalienable.

The Twenty-first paragraph of the bill is admitted (page 114 of the record). In it (page 11, record) the complainant states that it has never transacted any business or owned any property situated in the State of Oklahoma; has never maintained any office therein; has never had an agent, officer or representative therein, and that it has never complied with the laws of Oklahoma regulating, governing and controlling foreign corporations doing business within its borders.

ALLEGATIONS OF THE MARNET MINING CO. AND A. W. LEWIS.

The Marnet Mining Company, complainant in case No. 857, is, and was, at the date of the commencement of that suit, a corporate citizen of the State of West Virginia. For the purpose of transporting natural gas from the owners and producers thereof in the State, to purchasers and consumers thereof in the States of Kansas and Missouri, it has purchased a right of way over certain lands in Oklahoma, and proposes to build and construct a system of pipe lines from the States of Kansas and Missouri into Oklahoma, to be used exclusively for interstate transportation of natural gas, and not in any way for local traffic in the State. Upon the completion of said pipe line, it will be in the market for, and will be willing to buy and receive large quantities of natural gas, to be delivered at the wells in this State, and thence transported by it through said pipe lines out of the State, and into the States of Kansas and Missouri, for sale, distribution and use in those States.

A. W. Lewis is, and was, at the date of the commencement of said suit, a citizen and resident of the State of Ohio. He is the owner of an oil and gas lease made to him by one Stephen B. Tehee on the 12th day of May, 1905, by the terms of which he has acquired the right to construct wells on a certain tract of land in Oklahoma, belonging to

said Tehee, and to take therefrom all the gas which can be produced from said premises for a period of fifteen years from the date of said contract. Agreeable to the terms of said contract, complainant, at a cost of many thousand dollars, drilled and constructed a well upon said land, capable of producing many millions of cubic feet of gas per day.

STATE LAW ALLEGED TO BE UNCONSTITUTIONAL.

The law attacked by the Sixteenth paragraph of the bill is as follows (Article 1, Chapter 67, p. 586, Session Laws of 1907-8):

> "Section 1. Any firm, co-partnership, association or combination of individuals may become a body corporate under the laws of this State for the purpose of producing, transmitting or transporting natural gas to points within this State by complying with the general corporation laws of the State of Oklahoma, and with this act.
>
> "Sec. 2. No corporation organized for the purpose of or engaged in the transportation or transmission of natural gas within this State, shall be granted a charter or right of eminent domain, or right to use the highways of this State unless it shall be expressly stipulated in such charter that it shall only transport or transmit natural gas through its pipe lines to points

within this state; that it shall not connect with, transport to, or deliver natural gas to individuals, associations, co-partnerships, companies or corporations engaged in transporting or furnishing natural gas to points, places or persons outside of this State.

"Sec. 3. Foreign corporations formed for the purpose of, or engaged in the business of transporting or transmitting natural gas by means of pipe lines, shall never be licensed or permitted to conduct such business within this State.

"Sec. 4. No association, combination, co-partnership or corporation shall have or exercise the right of eminent domain within this State for the purpose of constructing or maintaining a gas pipe line or lines within this State, or shall be permitted to take private or public property for their use within the State, unless expressly granted such power in accordance with this act.

"Sec. 5. The laying, constructing, building and maintaining a gas pipe line or lines for the transportation or transmission of natural gas along, over, under, across or through the highways, roads, bridges, streets or alleys in this State, or of any county, city, municipal corporation or any other private or public premises within this State is hereby declared an additional burden upon said highway, bridge, road, street or alley, and any other private or public premises may only be done when the right is granted by express charter from the State, and shall not be constructed, maintained or operated until all damages to adjacent owners are ascertained and paid as prescribed by law.

"Sec. 6. All pipe lines for the transportation or transmission of natural gas in this State shall be laid under the direction and inspection of proper persons skilled in such business, to be designated by the chief

mining inspector for such duty, and the expenses of such inspection and supervision shall be borne and paid for by the parties laying and constructing such pipe lines for the transportation or transmission of natural gas.

"Sec. 7. No pipe line for the transportation or transmission of natural gas shall be subjected to a greater pressure than the three hundred pounds to the square inch, except for the purpose of testing such lines, and gas pumps shall not be used on any gas pipe line for the transportation or transmission of natural gas, or used on or in any gas well within this State.

"Sec. 8. Any corporation granted the right under the provisions of this Act to exercise the right of eminent domain, or use the highways of this State to construct or maintain a gas pipe line or lines for the transportation or transmission of natural gas to points within this State, which shall transport or transmit any natural gas to a point outside of or beyond this State, or shall connect with or attempt to connect with, or threaten to connect with any gas pipe line furnishing, transporting or transmitting gas to a point outside of, or beyond this State, shall, by each or all of said acts, forfeit all right granted it or them by the charter from this State, and said forfeiture shall extend back to the time of the commission of said act or said acts in violation of this Act; and such act or acts shall of themselves work a forfeiture of any and all rights of any and every kind and character which may be or may have been granted by the State for the transportation or transmission of natural gas within this State, and all the property of said corporation, and all the property at any time belonging to said corporation, at any time used in the construction, maintaining or operation of said gas pipe line or lines shall, in due course of law, be forfeited to and be taken into the possession of

the State through its proper office, and in said action there shall be a right to the State of the appointment of a receiver, either before or after the judgment, to be exercised at the option of the State, and the officer taking possession of said property shall immediately disconnect said pipe line or lines at a proper point in this State, from any pipe line or lines gonig out of or beyond the State. And said property shall be sold as directed by the court having jurisdiction of said proceedings, and the proceeds of said sale shall be applied, first to the payment of the cost of such proceeding, and the remainder, if any, paid into the school fund of the State, and said charter under which said act or acts were committed shall be revoked, and no charter for the transportation or transmission of natural gas shall ever be granted to any corporation having among its stockholders any person who was one of the stockholders of said corporation whose charter has or may have been forfeited as aforesaid, and if any such charter shall have been granted and thereafter a person shall become a stockholder thereof who was one of the stockholders of the corporation whose charter has been or may have been forfeited, as herein provided, the charter of said corporation, one of whose stockholders is as last named, shall therefore be forever forfeited and revoked. Provided, that any person who may be denied the right to become a stockholder as above prescribed may be granted the right to become such stockholder by the corporation commission, when such person shows to such commission that he was not a party to the former violation of this Act.

"Sec. 9. No pipe lines for the transportation or transmission of natural gas shall be laid upon private or public property when the purpose of such line is to transport or transmit gas for sale to the public until the same is properly inspected as provided in this Act: and

before any gas pipe line company shall furnish or sell gas to the public, it shall secure from the inspector a certificate showing that said line is laid and constructed in accordance with this Act, and under the inspection of the proper officer, provided, that nothing in this Act shall be construed to prevent persons drilling for oil and gas from laying surface lines to transport or transmit gas to wells which are being drilled within this State, and further provided, that factories in this State may transport or transmit gas through pipe lines for their own use for factories located wholly within this State, upon securing the right of way from the State over or along the highways and from property owners to their lands.

"Sec. 10. That no person, firm or association or corporation shall ever be permitted to transmit or transport natural gas by pipe lines in this State or in this State construct or operate a pipe line for the transmission of natural gas, except such persons, firms, associations or corporations be incorporated as in this Act provided, except as in section 9 of this Act, and provided further, that all persons, firms, corporations, associations and institutions now doing the business of transporting or transmission of natural gas in this State and otherwise complying with this Act, are hereby permitted to incorporate under the provisions of this Act within ten days after the passage and approval of the same.

"Sec. 11. All acts and parts of acts in conflict with this Act are hereby repealed.

"Sec. 12. An existing emergency is hereby declared by the Legislature for the preservation of the public peace, health and safety of the State.

"Sec. 13. This Act shall take effect from and after its passage and approval as provided by law.

"Approved December 21, 1907."

AMENDMENTS AND SUPPLEMENTS.

That statute was modified in some respects by an Act approved on March 27, 1909, Art. II, Chapter 26, pages 431 to 436, Session Laws of Oklahoma, 1909, as follows:

"Section 1. Any person, co-partnership or corporation in possession, either as owner, lessee, agent or manager of any well producing natural gas, in this State, in order to prevent the said gas wasting by escape, shall, immediately after this act takes effect, and immediately after penetrating the gas bearing rock, in any well hereafter drilled, shut in and confine the gas in said well until and during such time as the gas therein shall be utilized for lights, fuel or power purposes; Provided, this shall not apply to any well operated for oil; Provided, also, that when, in the course of drilling, gas production is developed, four days' free time shall be allowed in which to determine whether the well shall be shut and saved for a gas well or drilled in further for the purpose of producing oil.

"Sec. 2. It shall be unlawful for any person, co-partnership or corporation, either as owner, lessee, agent or manager of any pipe line in this State, through which natural gas flows from wells utilized for the production of gas only, to allow any unnecessary leak or waste to occur from said line.

"Sec. 3. It shall be unlawful to use natural gas for illuminating purposes in what are known as flambeau lights; but nothing herein shall prohibit the use of 'Jumbo' burners or other burners in glass globes, consuming no more gas than such 'Jumbo' burners, nor the burning of flambeau lights, not to exceed four in number, within or near the derrick of any drilling well.

"Sec. 4. The person, persons, firm, company or corporation consuming said gas, and using burners in open air or in or around derricks, shall turn off said gas not later than eight o'clock in the morning of each day such lights or burners are used, and shall not turn on or relight the same between the hours of eight o'clock a. m., and five o'clock p. m.

"Sec. 5. No gas shall be used or burned for illuminating purposes between the hours of eight o'clock a. m., and five o'clock p. m., unless the use of the same is regulated by meter.

"Sec. 6. No inflammable product from any oil or gas well shall be permitted to run into any tank, pool or stream used for watering stock; and all waste of oil and refuse from tanks or wells shall be drained into proper receptacles at a safe distance from the tanks, wells or buildings, and be immediately burned or transported from the premises, and in no case shall it be permitted to flow over the land. Salt water shall not be negligently allowed to flow over the surface of the land.

"Sec. 7a. All lessees or operators drilling or operating for crude oil or natural gas within the State of Oklahoma shall immediately, in a practical and workmanlike manner, under the supervision of the oil and gas inspector, as hereinafter provided, plug all dry or abandoned oil and gas wells in which oil or gas bearing stratum has been found, in the following manner: Beginning at the bottom of the hole, same shall be solidly filled with crushed rock or sand pumpings, or both, to a point twenty-five feet above the top level of the oil or gas bearing sand; at that point a wooden plug of seasoned pine, two feet in length and not less than one-half inch in diameter less than the inside diameter of the hole at that point, shall be placed; thereafter the hole shall be filled up solidly twenty-five feet farther

with a substance consisting of one-third portion of cement and two-thirds portion of sand, properly mixed with water; thereafter, another wooden plug of seasoned pine, two feet in length and not less than one-half inch in diameter less than the inside diameter of the hole at that point, shall be placed; thereafter, the hole shall be filled up solidly twenty-five feet farther with crushed rock and sand pumpings, or both; and provided further, that all such wells drilled to the Mississippi lime shall be plugged above the Mississippi lime in the same manner as provided for herein above, as to the plugging of wells in the upper oil and gas bearing stratum, all abandoned wells shall immediately be closed and marked, and provided further, that when any such lessee or operator removes the derrick from and around such wells, he shall plug such wells in some good and substantial manner, at least ten feet below the surface, and fill such well from that point to the surface with such material as will prevent the well from caving before final abandonment.

"Sec. 7b. The Chief Mine Inspector shall appoint, subject to removal by him, such deputies of at least five years' practical experience in operating and drilling oil and gas wells, and who is not, directly or indirectly, interested in the production of oil or gas, as may be necessary to the full performance of the duties required by law. The Chief Mine Inspector, or his deputies, shall personally supervise the using and operating of natural gas in this state, and the proper observance of the laws of the State dealing with the drilling and production of oil and gas, or the piping or storage, or purcase or use thereof within this State. Said Chief Mine Inspector shall designate one of his deputies to be chief deputy inspector of oil and gas wells and pipe lines, and all duly appointed deputies shall reside at a convenient place for the performance of their duties, and

a written notification of their residence shall be kept on file in the office of the Chief Mine Inspector; the chief deputy inspector of oil and gas wells and pipe lines shall receive a compensation not to exceed two thousand dollars per annum and traveling and maintenance expenses while in the performance of his duties, and all other deputies so duly appointed shall receive as compensation not to exceed five dollars per day and their actual traveling and maintenance expenses while in the performace of their duties, to be appropriated out of the receipts of the gross revenue taxes levied and collected upon the production of gas and oil and the storage and carriage thereof. And for the purpose of said compensation, the sum of ten thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of said gross receipts named to cover the period from this time to and including the 30th of June, 1911.

"Sec. 7c. Whenever it becomes necessary to plug any well as required by law, the lessee or operator thereof shall at once notify, in writing, the inspector of gas and oil wells at the office of the Chief Mine Inspector, or by personal written notification to the inspector of gas and oil wells at his residence, whereupon said inspector, or his deputy, shall repair to said well and supervise the plugging thereof.

"Sec. 7d. Upon the arrival of said inspector, or his deputy, at the well to be plugged, the lessee or operator thereof shall furnish the inspector a record of the drilling of said well, verified under oath, showing a true and correct log of the well.

"Sec. 8. It is hereby declared to be unlawful for any person or persons maliciously to set fire to any gas or oil escaping from wells, broken or leaking mains, pipes, valves, tanks or other appliances, used by any

person, company or corporation in conveying gas or oil, or to interfere in any manner with the wells, pipes, mains, gate boxes, valves, stopcocks or other appliances machinery or property of any person, company or corporation engaged in furnishing gas or oil unless employed by or acting under the authority and direction of any such person, company or corporation owning or operating said gas or oil lines, or the proper legal authorities.

"Sec. 9. Any person, co-partnership or corporation violating any of the provisions of this act shall, upon conviction thereof, be fined in any sum of not less than twenty-five dollars, nor more than five hundred dollars, in any court having competent jurisdiction in the county in which the act shall have been committed or omitted, or by being imprisoned for not less than thirty days nor more than ninety days, or by both such fine and imprisonment. The amount of said penalty, when collected, shall be paid, one-half into the public road fund of the county in which said suit shall have been brought, and one-half to the informer in said action.

"Sec. 10. Before any gas pipe line corporation shall acquire any right of way, or exercise right of eminent domain within this State, or construct any pipe lines for the transportation of gas, it shall file in the office of the Corporation Commission a plat showing in detail the points in this State, between, and the route along which its trunk line is proposed to be constructed, the intended size and capacity thereof, and the location and capacity of all pumping stations, gate valves, check valves and connections of all kinds on said trunk lines; and upon the demand of the Corporation Commission they shall file a plat showing in detail all the lines owned or operated by them, with full information as to their capacity and size, location and capacity of their

pumping stations, gate valves, check valves and connections of all kinds in existence.

"Sec. 11. All domestic gas pipe line corporations in this State are hereby authorized to build and operate and for that purpose to acquire, whether by purchase or the exercise of eminent domain, sites for the erection of pumping stations in this State wherever the same may be necessary, due consideration being had for the size, capacity, pressure, facilities and powers of all other gas pipe line corporations and gas consumers and gas producers, in the same gas district, which may be affected by the use of said pumps.

"Sec. 12. Every domestic gas pipe line corporation in this State is hereby given authority to build, construct and maintain gas pipe lines over, under, across or through all highways, bridges, streets or alleys in this State, or any public place therein under the supervision of the inspector of oil and gas wells and pipe lines as to where and how in said highways, bridges, streets, alleys and public places said pipe lines shall be laid, subject to the control of the local municipalities as to how the business of distribution in that municipality shall be conducted, and subject to responsibility as otherwise provided by law. Provided, however, that whenever any gas pipe line crosses the land or premises of any one outside of a municipality, said corporation shall, upon request of the owner of said premises, connect said premises with a pipe line and furnish gas to said consumer at the same rate as charged in the nearest city or town.

"Sec. 13. All acts and parts of acts in conflict herewith are hereby repealed.

"Sec. 14. For the preservation of the public peace, health and safety, an emergency is hereby declared to

exist, by reason whereof this Act shall be in force and effect from and after its passage and approval.

"Approved March 27, 1909."

Particularly the effect of Section 11 of the above as affecting Section 7 of the gas law of 1907-8 will be noted.

Also note an Act approved March 27, 1909, (Art. I, Chap. 26, Session Laws 1909, p. 425 to 430). Particularly note the second and third paragraphs of Section 2 thereof. Section 1 had provided that no company, individual or joint stock association should transport the products of petroleum except in accordance with this act. Section 2 provides:

"Corporations of other States and Territories, or of the United States, otherwise admissible to do business in this State, may get the benefit of this act upon compliance with the laws and constitution of this State, including the provisions of Section 31 of Article 9 of the constitution, but until such compliance shall have no rights in, on or under the highways.

"The word 'Person,' as used in this act, means any natural person, partnership, or association of persons, or any corporation organized under the laws of the State of Okelahoma."

And the effect of the second paragraph of section 2, in so far as it denied the benefit of the act, or any right in, on or under the highway, except upon compliance with section 31 of article 9 of the constitution will be noted.

Section 31 of Article 9 of the Constitution of Oklahoma is as follows:

> "Sec. 31. No railroad, oil pipe line, telephone, telegraph, express or car corporation organized under the laws of any other state, or of the United States, and doing business, or proposing to do business in this State, shall be entitled to the benefit of the right of eminent domain in this State until it shall have become a body corporate pursuant to or in accordance with the laws of this State."

Also, the second paragraph of Section 7 of the last named law provided as follows:

> "All persons, natural or artificial, except foreign corporations, shall have the right of eminent domain, and any right or privilege hereby conferred, when necessary to make effective the purposes of this act and the rights thereby conferred. Foreign corporations organized under the laws of any other state, or the United States, and doing or proposing to do business in this state, and which shall have become a body corporate pursuant to or in accordance with the laws of this state, and which, as hereby provided, shall have registered its acceptance of the terms thereof, shall, receive all the benefits provided by this act."

It will be noted that the acts approved March 27, 1909, became a law after the commencement of these actions but before the final decree.

NUISANCE LAWS OF OKLAHOMA.

The court will also please mark sections 4751, 4752, 4758 and 4761 of the Oklahoma nuisance laws, Snyder's Compiled Laws of Oklahoma, 1909:

> "Section 4751. A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either: 1st. Annoys, injures or endangers the comfort, repose, health, or safety of others; or, 2nd. Offends decency; or, 3rd. Unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake or navigable river, bay, stream, canal or basin, or any public park, square, street or highway; or, 4th. In any way renders other persons insecure in life, or in the use of property.
>
> "Section 4752. A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon the individuals may be unequal.
>
> "Section 4758. The remedies against a public nuisance are: 1, indictment, or, 2, a civil action, or, 3, abatement.
>
> "Section 4761. A public nuisance may be abated by any public body or officer authorized thereto by law."

We also request that the court take note of section 5751 of Snyder's Compiled Laws of Oklahoma, 1909, providing the procedure by which a public nuisance may be abated, as follows:

> "The defendant may, at any time before judgment

upon reasonable notice to the plaintiff, move to discharge an attachment; as to the whole or part of the property attached."

And sections 6189 and 6190, of the Oklahoma Civil Procedure as providing the remedy by which one unlawfully exercising a franchise may be ousted therefrom:

"Sec. 6189. Such action may be brought in the Supreme Court or in the district court, in the following cases: 1st, When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, or shall claim any franchise within this State, or any office in any corporation created by authority of this State; 2nd, Whenever any public officer shall have done or suffered any act which, by the provisions of law, shall work a forfeiture of his office; 3rd, When any association or number of persons shall act within this State as a corporation without being legally incorporated; 4th, When any corporation do or admit acts which amount to a surrender or a forfeiture of their rights and privileges as a corporation, or when any corporation abuses its power or exercises powers not conferred by law; 5th, Where any corporation claims, by virtue of a congressional grant, any of the public lands or Indian lands to which the Indian title or right of occupancy has been extinguished; 6th, For any other cause for which a remedy might have been heretofore obtained by writ of quo warranto, or information in the nature of quo warranto.

"Sec. 6190. When the action is brought by the attorney general or the county attorney of any county of his own motion, or when directed to do so by competent authority, it shall be prosecuted in the name of the State, but where the action is brought by a person claiming an interest in the office, franchise or corporation, or claiming any interest adverse to the franchise,

gift or grant, which is the subject of the action, it shall be prosecuted in the name and under the direction, and at the expense of such persons; whenever the action is brought against a person for usurping an office by the attorney general or the county attorney, he shall set forth in the petition the name of the person rightfully (entitled) to the office and his right or title thereto; when the action in such case is brought by the person claiming title, he may claim and recover any damage he may have sustained."

The nuisance law, the injunctive remedy, and the remedy by quo warranto are called to the attention of the court because it is under these statutes that the Attorney General of the State was attempting and threatening to proceed and there is no showing that any of these statutes are unconstitutional or that the Attorney General has in the past or will in the future administer them in court in an unconstitutional manner.

GENERAL QUESTIONS INVOLVED.

The *position of the appellees* is that (1) as to the Kansas Natural Gas Company and The Marnet Mining Company, the officials of the State are attempting to interfere with interstate commerce; and (2) as to Lewis, that the State is attempting to take his property without due process of law in depriving him of the opportunity of selling and

delivering to companies situated as are the Kansas Natural Gas Company and The Marnet Mining Company.

The *position of the appellants* is that they are state officials attempting to execute in proper manner a valid police regulation of the state, and as such that their position is that of the state which is:

That the act of 1907-8 attacked is one to prevent distributive waste;

That the acts of 1909 are amendments and supplements to that of 1907-8;

That the power attempted to be applied is that of *conservation of the sole adequate fuel supply of the state.*

And the rights of common owners in a common supply of natural gas as against unnatural and wasteful use of pumps which expose the common supply both of gas and oil to destruction by salt water.

That the common oil and gas supply immediately borders the Kansas boundary line and that appellants intend and are about to erect enormous pumps in Kansas beyond the control of the State of Oklahoma which will injuriously effect the common oil and gas supply in Oklahoma.

That because of the geological facts as to the porous sand rocks containing gas, oil and salt water, and the geographical facts as to the proximity of the common supply to

the state boundary the classification prohibiting foreign companies from the gas transportation business in Oklahoma rests upon a reasonable and proper distinction.

That in any event the state properly can confine the gas transportation to its domestic corporations and forbid any others passing along, under, in or across its highways.

In no event should the appellant, the Attorney General of the State, be enjoined from enforcing the other laws of the state and the common law—for instance, the state's highway and nuisance laws—as against the appellees though such enforcement may render impossible appellees prosecution of its desires as to transportation of natural gas in Oklahoma and the building by it of its pipe lines in or across the state highways.

Further, that as to the Kansas Natural Gas Company and The Marnet Mining Company because they are not domestic corporations in Oklahoma, they are not affected by the law. That only affects them by omission to give them franchises, not by commission in taking away rights.

As to A. W. Lewis, a man cannot acquire a right to property by his desire to use it in commerce among the states.

MANNER IN WHICH THE QUESTIONS ARE RAISED.

The questions are raised by the bill, the answer, and the decree thereon. The bill claimed, in short, that the Kansas Natural Gas Company and The Marnet Mining Company, the first a corporate citizen of the State of Delaware, the second a corporate citizen of the State of West Virginia, had made contracts for the purchase of natural gas to be delivered at the wells in Oklahoma and to be transported by them separately to various cities in other states, there to be used by the public, and that A. W. Lewis was an owner of natural gas wells in Oklahoma and desired to sell his gas product to such persons as the Kansas Natural Gas Company and The Marnet Mining Company and whomsoever else he might make a profitable contract with; that said companies had been granted a right-of-way by the Secretary of the Interior over the lands of Indians in the Indian Territory; that they did not intend to engage in any kind of commerce in Oklahoma, but solely in interstate commerce; that they did not intend to do any kind of business in the State of Oklahoma except the laying of their pipe lines over a right-of-way which they had acquired by purchase and contract with the owners thereof and did not intend to cross any road in the state except after obtaining the right to so cross from the abutting owners; and they complained that in the year 1907-8 the State of Oklahoma by the passage of the law herein designated Chapter 67 of the Session Laws

of that year by prohibiting the transportation or transmission of natural gas along, over, under, across or through the highways except when such right is granted by express charter from the state, interfered with interstate commerce and took their property without due process of law in violation of the constitution of the United States and of the constitution of the State of Oklahoma. The answer, in short, alleged that there was a supply of natural gas in Oklahoma contained in the porous rock under the soil in various portions of the northeastern part of the State; that said gas was found overlapping and underlapping deposits of oil and salt water; that it was in a common source of supply underneath the lands of many owners; that the supply in Oklahoma was very much less than the demand for its consumption in that state; that it is the only adequate fuel supply in the State of Oklahoma, in that at this time, at least, the use of oil to any great extent as a power producer is not commercially practicable in a general sense, that for various reasons named the supply of coal is becoming more and more expensive and inadequate. The court judicially knows of the dryness of the country and that no water power can be used as a substitute. The answer states that because of lack of a wood supply, no reliance can be placed on the consumption of wood; that it is impossible for one owner of a gas well to take out a supply of gas without injuriously affecting all other owners of land under which gas may be located; that the complainants intend to erect enormous pump stations immediately north of the Kansas line where they

will be out of reach of the Oklahoma laws and that such pumps or compressors, if allowed to operate, will so deplete the rock pressure and so create a vacuum in the wells with which the said lines with pumps upon them shall connect, that the salt water which underlies in all cases the gas as well as the oil, will be allowed to flow up into the wells and to flood and destroy the same. From the answer it will readily be conceived that gas, oil and salt water are found in the porous rock in the order named; that where a well is drilled into the rock the rock pressure naturally keeps the water down until the gas and oil come up out of the well, but that where the rock pressure is greatly depleted, the natural friction prohibits the gas or oil from rapidly flowing into the well, but that as the rock pressure is removed naturally the pressure being taken off the water rises in the well, so that where a vacuum is created the water will rush in and fill it rather than the oil and gas, which are prevented by friction in passing rapidly through the rock, the salt water standing ever higher in the well as the rock pressure is removed; that thus the property rights of the individual owners of gas are subject to the restriction that the same must not be removed too rapidly or by the use of pumps for fear of injuring the rights of other common owners of the common supply, and that they are in the position of persons whose rights, such as they are, are subject to this restriction, which cannot be removed from the power of the state from making a contract about them; i. e. that such contract will carry with it the infirmity of

the subject matter; that the right to receive the natural gas through pipes is subject to territorial limits by nature, and that those limits may be fixed by the state to such a degree as pumping shall not interfere with the rights of the other common owners and within such limits as the state may enforce this policy even if the limits are made to coincide with the state line; that within that boundary foreign citizens are as free to purchase as are the citizens of Oklahoma, but when the question of transportation arises the state may properly refuse to endow foreign corporations or individuals with the power of eminent domain and likewise may refuse to endow foreign corporations or individuals with the right to cross by erecting a permanent plant either in, over or along its highways; that the control of its highways is a governmental matter and in it no one can have property rights. The lower court denied these contentions of the state and granted a permanent injunction, from which an appeal was taken to this court. The final decree appear at pages 133 and 134 of the record; the application for appeal appears at page 135 and following of the record; the order allowing appeal appears at page 136 of the record; the assignment of errors appears at pages 137 and 138 of the record; the bond at page 139 and the stipulation of the parties at page 141 with reference to what should constitute the record in this appeal.

II. SPECIFICATIONS OF ERRORS.

The assignment of errors stated:

1. That the lower court erred in restraining this defendant from committing any of the acts complained of in the bills or in any way interfering with the laying, building and construction of the complainants' pipe line in the State of Oklahoma by reason of any of the terms of Chapter 67 of the Session Laws of 1907-8 or by reason of other claimed authority or statute, or common law rights, rule of action or unwritten law whatsoever; and from instituting any suit or suits against the complainants for the purpose of enjoining them from laying, building, constructing, maintaining or operating any gas pipe line either under the authority of said Chapter 67 or under any other law or statute of Oklahoma or under any common law right, rule of action or unwritten law.

2. That the court erred in enjoining the defendant from interfering with the construction of plaintiffs' pipe line by reason of said Chapter 67 of the Laws of Oklahoma of 1907-8.

3. That the court erred in enjoining the defendant from interfering with the construction of plaintiffs' pipe lines in the State of Oklahoma by reason of any other statute of the State of Oklahoma than said Chapter 67.

4. That the court erred in enjoining the defendant from prosecuting or conducting any suit against the complainants for the purpose of enjoining them from constructing or operating any gas pipe lines and this whether done under the authority of said Chapter 67 or any other law or statute of the state or any common law right, rule of action, or unwritten law of the state.

III. BRIEF AND ARGUMENT.

SUMMARY OF AUTHORITIES RELIED ON BY APPELLANTS.

FIRST.

Act of 1907-8, as well as supplementary legislation of 1909 within the proper police power of the state.

Ruling principle is conservation not commerce, due process clause single issue.

Consumers Gas Co. v. Harless, 29 N. E. 1062;
Northwestern Tel. Ex. Co. v. City of St. Charles, 154 Fed. 386;
Western Union Co. v. Pa. R. Co., 195 U. S. 540;
Wilson v. Hudson Co. W. Co., 76 Atl. 560.

Justifiable taking overruling other principles.

Clark v. Nash, 198 U. S. 361;
Strickley v. Highland Boy Gold Min. Co., 200 U. S. 527;
Offield v. N. Y. N. H. & H. R. Co., 203 U. S. 372;
Bacon v. Walker, 204 U. S. 311;
Noble State Bank v. Haskell, 31 S. C. R. 186;

Special climatic conditions justify taking for public use.

Bacon v. Walker, *supra.*
Clark v. Nash, *supra.*

Special topographical conditions likewise.

Strickley v. Highland Boy Co., *supra.*
Offield v. N. Y., N. H. & H. R. Co., *supra.*

Peculiar mineralogical character of oil, gas and water likewise.

Ohio Oil Co. v. Indiana, 177 U. S. 190;
Lindsley v. Nat. Carb. Gas. Co., (Dec. March 13, 1911);
Katz v. Walkinshaw, (Cal.) 64 L. R. A. 236;
Hudson Co. W. Co. v. McCarter, 209 U. S. 281;
Kansas v. Colo., 185 U. S. 125.

State may restrain the reckless, i. e. conservation.

Holden v. Hardy, 169 U. S. 397;

Instances of conservation upheld though other rights thereby limited.

McCready v. Virginia, 94 U. S. 391;
Manchester v. Mass., 139 U. S. 240;
Geer v. Conn., 161 U. S. 519;

Ohio Oil Co. v. Indiana, 177 U. S. 190;
Kansas v. Colo., 185 U. S. 125;
Manigault v. Springs, 199 U. S. 473;
Georgia v. Tennessee Co., 206 U. S. 230;
Hudson Co. W. Co. v. McCarter, 209 U. S. 349;
N. Y., ex rel. Silz v. Hesterberg, 211 U. S. 31;
Lindsley v. Natural Carbonic Gas Co., This Term;
Mfgs. Co. v. Indiana Co., 50 L. R. A. 134;
Consumers Co v. Harless, 29 N. E. 1062;
Townsend v. State, 47 N. E. 19;
Given v. State, 66 N. E. 750;
State v. Ohio Co., 49 N. E. 809;
Jannison v. Indiana Co., 128 Ind. 555;
Wilson v. Hudson Co., 76 Atl. 560;
Welch v. Swasey, 193 Mass. 364;
Wadleigh v. Gilman, 12 Me. 403;
Salem v. Maynes, 123 Mass. 372;
Am. Point. Wks. v. Lawrence, 23 N. J. L. 9;
Mugler v. Kansas City, 123 U. S. 623;
Korasek v. Peter, 50 L. R. A. 345;
Smith v. Morse, 148 Mass. 407;
St. Louis v. Gault, 179 Mo. 8;
Summerville v. Presley, 33 So. Ca. 56;
Katz v. Walkinshaw, 63 L. R. A. 326;
Ex parte Elam, 91 Pac. 811;
Windsor v. State, 64 Atl. 288;
Questions & Answers, 103 Me. 506;
Com. v. Tewksbury, 11 Metc. 55.

No unlimited use to oil, gas, or water under land except for use connected with land.

Forbell v. N. Y., 164 N. Y. 522;
Hathorn v. Nat. Carb. Co., 87 N. E. 504.

SECOND.

The act is valid as an exercise of the state's police power in its control over the use of its highways for transportation purposes.

(a) The state's highways are its public property.

St. Louis v. Western Union Tel. Co., 148 U. S. 92, 101;
Atty. Gen. v. Shrewsbury Bridge Co., 21 Chanc. Div. 752;
Richmond v. Southern Bell Tel. Co., 174 U. S. 746, 19 Sup. Ct. Rep. 778, 782;
Memphis v. Postal Tel. Cable Co., 139 Fed. 707;
3 Elliott on Railroads, (2nd Ed.) Sec. 1076.

(b) The right to use the highways in maintaining a gas pipe line,—a permanent plant,—is a franchise.

N. O. Gas Light Co. v. La. etc. Co., 115 U. S. 650;
Foster Lbr. Co. v. A. V. & W. Ry. Co., 20 Okla. 583, 95 Pac. 224, on re-hearing, 100 Pac. 1110.
State v. Cincinnati Gas Light Co., 18 Ohio St. 262;
Gibbs v. Consolidated Gas Co., 130 U. S. 396;
Jersey City Gas Co. v. Dwight, 29 N. J. Eq. 242, 248;
Purnell v. McLane (Md.) 56 Atl. 830;
Pittsburg, etc. R. R. Co. v. Hood, 94 Fed. 618;
Hardman v. Cabot, (W. Va.), 55 S. E. 756, 7 L. R. A. (N. S.) 506;
Ward v. Trifle St. Nat. Gas Co., (Ky.), 74 S. W. 709.

(c) This being true the right must either be acquired by grant or by condemnation.

Blair v. Chicago, 201 U. S. 400, 26 Sup. Ct. Rep. 427, 439;
Louisville Trust Co. v. Cincinnati, 76 Fed. 296, 308.

(d) The right has not been granted by the State, and the appellees do not assert any right by grant.

(e) The right of eminent domain is not granted to foreign corporations. This right may be lawfully granted to domestic corporations and withheld from foreign.

Beale on Foreign Corporations, Sec. 115;
State v. Scott, 22 Nebr. 628, 36 N. W. 121;
Trestor v. Mo. Pac. R. R. Co., 23 Neb. 242, 36 N. W. 503;
State v. C. B. & Q. R. R. Co., 25 Nebr. 156, 41 N. W. 152, 2 L. R. A. 564;
Keonig v. C. B. & Q. R. R. Co., 27 Nebr. 699, 43 N. W. 423;
Holbert v. St. L. etc. R. R. Co., 45 Ia. 23;
Evansville, etc. Co. v. Hudson Bridge Co., 141 Fed. 51;
Foltz v. St. L. & S. F. R. R. Co., 60 Fed. 316.

(f) The right of eminent domain for purposes of interstate commerce might be granted by the United States.

Beale on Foreign Corporations, Sec. 115 note,
U. P. R. R. Co. v. B. & M. R. R. Co., 3 Fed. 106.

But the United States have not granted it for the purpose here involved.

(g) The right claimed by appellees being a franchise and not having been granted either by the state or the United States cannot be exercised without condemnation and as the power of eminent domain has neither been granted by the state nor by the United States, the right cannot be acquired by condemnation. Therefore the appellees have not the right by the state's volition, nor have they the power to take it without the state's volition.

(h) The appellees claim the right by grant from the owners of the abutting land.

For highway purpose, including all transportation, the state has control regardless of the fee.

Barney v. Keokuk, 94 U. S. 324;

And the abutter cannot grant the right to appellees.

State v. Kansas Nat. Gas Co. (Kan.) 80 Pac. 962;
M. & E. R. Co. v. Mayor, 10 N. J. Eq. 352;
Young v. Harrison, 6 Ga. 130;
Dyer v. Tuskaloosa Bridge Co., 2 Porter (Ala.) 296;
Lewis on Eminent Domain, Sec. 91c to 91l.

The state's control of transportation is superior to the right of the abutter.

Cheney v. Barker (Mass.) 84 N. E. 492, 16 L. R. A. (N. S.) 436;
Snively v. Washington Town, 218 Pa. 249, 67 Atl. 465, 12 L. R. A. (N. S.) 918;

(i) The state having control of the public highways

may grant privileges to its own citizens and refuse them to others, including foreign corporations.

McCready v. Va., 94 U. S. 391;
Consumers Gas Co. v. Harless, (Ind.) 29 N. E. 1062.

This is illustrated by its right to grant eminent domain to domestic corporations and withhold it from foreign corporations.

THIRD.

The act is valid as an exercise of the state's police power in creating and controlling its own corporations.

Noble State Bank v. Haskell, 31 Sup. Ct. Rep. 186.

If banking, which has always been regarded as a common right, can be confined to corporations, it seems clear that constructing a permanent plant in the highway, which has always been regarded as a franchise, can be confined to corporations.

The appellees not being domestic corporations, therefore, have not the right to construct gas pipe lines in Oklahoma, and therefore are not affected by the provisions of the law restricting domestic corporations in the conduct

of their business, and therefore have no right to complain of the law or any of its provisions.

Hatch v. Reardon, 204 U. S. 153;
Lee v. State, 207 U. S. 67;
Dolly v. Abilene Nat. Bank, 179 Fed. 461.

FOURTH.

The act does not regulate interstate commerce but only affects it indirectly, just as it might be affected by the denial of the right of eminent domain to foreign corporations or the refusal to grant a city franchise to an interstate pipe line company or an interstate telephone company.

N. W. Tel. Exchange Co. v. St. Charles, 154 Fed. 386;
Consumers Gas Co. v. Harless, (Ind.) 29 N. E. 1062;
Wilson v. Hudson Co. Water Co., (N. J.) 76 Atl. 560, 566, 567.

ARGUMENT

FIRST.

The refusal to grant a pipe line the power of eminent domain, though a pipe line is engaged in interstate commerce, is not thereby an interference with interstate commerce.

> Consumers Gas Company v. Harless, 131 Ind. 446, 29 N. E. 1062.

The refusal of the state to allow the use of its roads is likewise not an interference with interstate commerce.

> Northwestern Tel. Ex. Co. vs. The City of St. Charles, 154 Fed. 386.

In fact the use of streets or roads is the equivalent to the exercise of the power of eminent domain.

> Gibbs vs. Gas Co. of Baltimore, 130 U. S. 397, at 411.

Private property may not be taken by a business engaged in interstate transmission though an act of Congress authorize the prosecution of the particular business.

> W. Union Telegraph Co. v. Pennsylvania Railroad Co., 195 U. S. 540.

And though the private property sought to be taken

be public property, that is, a public highway, a railroad right-of-way.

> Western Union Telegraph Co. vs. Pennsylvania Railroad Co., supra.

Though the public property sought to be taken be a street of a city it cannot be taken.

> St. Louis vs. Western Union Telegraph Co., 148 U. S. 92.

> "A man cannot acquire a right to property by his desire to use it in commerce among the states. Neither can he enlarge his otherwise limited and qualified right to the same end."
>
> Per Holmes, J., in Hudson County Water Co. vs. McCarter, 209 U. S. 349-357.

The United States may grant the power of eminent domain.

> Union Pacific Co. vs. Burlington Co., 3 Fed. 106;
> United States vs. Chicago, 7 How. 185;
> Kohl vs. United States, 91 U. S. 367;
> Stockton vs. Baltimore Co., 32 Fed. 17;
> Chesapeake Canal Co. vs. Union Bank, Federal Cases, No. 2653;
> In re Montgomery, 48 Fed. 896;
> Monongahela Nav. Co. vs. U. S., 148 U. S. 312.

The power of Congress over interstate commerce vests it with the power to grant the power of eminent domain, location and operation.

> Cherokee Nation vs. Southern Kansas Railway Co., 135 U. S. 641.

All the power, therefore, that the complainants desire to use being within the power of Congress to grant, it is as logical to assert that the Oklahoma law is unconstitutional because Congress has not granted the desired powers as to assert it is unconstitutional because the state has withheld such powers. The right of the state to withhold the power of eminent domain has never been questioned; it was taken for granted in:

State of Nebraska vs. Scott, 22 Nebr. 628, 36 N. W. 121;
Trestor vs. Missouri Pacific Ry. Co., 23 Nebr. 242, 36 N. W. 507;
State vs. C. B. & Q., 25 Nebr. 156, 41 N. W. 125, 2 L. R. A. 564;
Koenig vs. C. B. & Q., 27 Nebr., 699, 43 N. W. 423;
Holbert vs. St. L. K. C. & N. R. Co., 45 Iowa, 23;
Evansville & Henderson Traction Co. vs. Henderson Bridge Co., 141 Fed. 51, 72 C. C. A. 539;
Foltz et al. vs. St. Louis & S. F. Ry. Co., 60 Fed. 316, 8 C. C. A. 635.

In fact this court has often affirmed that where a municipality has granted an exclusive franchise, such grant constituted a right which cannot be abridged.

New Orleans Gas Co. vs. Louisiana Light Co., 115 U. S. 650;
New Orleans Water Co. vs. Rivers, 115 U. S. 674;
Louisville Gas Co. vs. Citizens Gas Co., 115 U. S. 683.

The power to grant an exclusive right presupposes the power to refuse to make the grant, else no contract could be thereby created. Where there is no property right or but

a restricted property right, the burden of such restriction is not an interference with commerce because the party desires to use the commodities in interstate commerce.

New York vs. Hesterberg, 211 U. S. 31.

Dealing in futures by interstate telegraph may be prohibited by the state.

Logan vs. Postal Telegraph Co., 157 Fed. 570.

Wilson, Attorney General, vs. Hudson County Water Company et al., (New Jersey), 76 Atl. 560, is in principle on all fours with this case, for there was an attempt of the company to lay water pipes under the bed of the river in such a way as not to interfere with the river, for the purpose of transporting water in interstate commerce without the consent of the State of New Jersey. Here it will be claimed that the title of the road is not in the state, though this we dispute, and affirm that the title is in the state, yet this difference is immaterial because the use of the highway is not a matter of property but of governmental control.

Northwestern Telegraph Ex. Co. vs. City of St. Charles, 154 Fed. 386.

Thus the only question in the case is whether the legislation involved is a reasonable police power. In other words, does the legislation involved take property without due process of law? As pointed out at this term in this court in Noble State Bank vs. Haskell, likewise in Hudson County Water Company vs. McCarter, supra, the Fourteenth Amendment must not be pressed to a dryly logical extreme.

Scholastically, many constitutional laws may in their extreme and isolated consideration be shown to violate provisions of the constitution. The law of continuance, that is, that each thing flows into something else and that in nature and science there is no absolute definition or isolation, must be recognized as well in jurisprudence.

A series of cases established that an ulterior public advantage may justify a comparatively insignificant taking of private property.

Clark vs. Nash, 198 U. S. 361;
Strickley vs. Highland Boy Gold Mining Co., 200 U. S. 527;
Offield vs. N. Y., N. H. & H. Ry. Co., 203 U. S. 372;
Bacon vs. Walker, 204 U. S. 311.

The guaranty bank cases of this term affirm the right of the state to confine in proper cases a business to corporations and to corporations domestic in the state.

Guaranty Bank Cases of this Term, Noble State Bank vs. Haskell et al., supra, and cases therein cited;
State vs. Woodmanse, 1 N. Dak. 246, 11 L. R. A. 420, 46 N. W. 970;
Brady vs. Mattern, 125 Iowa, 158; 100 N. W. 358;
Weed vs. Bergh, 141 Wis. 569, 25 L. R. A. (N. S.) 1217, 124 N. W. 664;
Commonwealth vs. Vrooman, 164 Pa. 306, 25 L. R. A. 250, 30 Atl. 217;
Myers vs. Irwin, 2 Serg. and R. 368;
Myers vs. Manhattan Bank, 20 Ohio, 283-302;
Atty. Gen'l vs. Utica Ins. Co., 2 Johns. Ch. 371-377.

The State of Oklahoma by Section 2, Article 9 of the constitution, has confined to domestic corporations the power to locate and operate transportation and transmission business. If the right to transport gas in pipe lines had existed in common law, still it might be abridged by statute.

Munn vs. Illinois, 94 U. S. 113;
State vs. Stebbins, 1 Stewart (Alabama) 299.

The exercise of police power can violate no property right.

Sioux City Co. vs. Sioux City, 138 U. S. 98;
N. Y., New Haven Co. vs. Bristol, 151 U. S. 559;
N. Y., New Haven & Hartford Co. vs. Interstate Commerce Commission, 200 U. S. 361;
Atty. Gen'l vs. Insurance Co., 82 N. Y. 172.

The case resolves itself into this single question: Are the devices used by the state by way of prohibiting the use of pumps, by way of prohibiting the highways and eminent domain to those concerns that may not be controlled by the state, and this done in the state's rights as *parens partriae*, and also to preserve the common supply for the various owners of the soil, such a proper exercise of police power? It seems to us that Ohio Oil company vs. Indiana, 177 U. S., 190, and Linsley vs. Natural Carbonic Gas Co., this term No. 260, are entirely decisive of this question.

It may be best at this point to consider the nature of gas and oil.

The answer (page 106 of the record) averred that

there were only 273 commercial gas wells in the state at that time. While of course the allegations of the answer must be taken as true, yet for the purpose of illustrating and emphasizing them it may be well to look at certain of the reports issued by the government.

In the United States Geological Survey for 1908, Mineral Resources of the United States, Volume 2, Non-metallic Products, at page 386, under the head of "Petroleum," are given the well record of oil and gas wells in Oklahoma for the period ending on the first of January, 1908. It appears on page 386 that in Oklahoma there were 102 gas wells completed this year. It also appears at page 391 of the same that the entire number of wells in Osage County completed to December, 31, 1908, was 78 gas wells. On pages 382-392 it appears that the number of gas wells for each of the years 1904, 1905, 1906, 1907 and 1908,—that is, up to the time that the suit was filed,—"brought in" in the years named were respectively 21, 98, 163, 148, and 102, aggregating 532. As 1904 was the beginning of the gas, the entire number of gas wells in Oklahoma at the time the suit was filed, amounted to 532. There is no later record than 1908, but it must be presumed at least in the year 1909 the number of wells would be something like the number of wells produced in 1906, 1907 and 1908, that is, in the neighborhood of 100, and that in the year 1909 there would be about 650 wells. In 1910, likewise, the figure would run up to something like 750, and yet the answer avers that at that time there were

but 273 commercial wells. In other words, two-thirds of the wells that were productive in the beginning are already dry. What it is that makes them dry will appear on page 337 of the same publication in an article on the history of natural gas. It is there stated: "In Montgomery County the gas pumps are having a marked effect upon the rock pressure of some of the wells." The answer (page 107 of the record) said that the present daily consumption is more than can safely be taken from the wells without rapidly destroying their efficiency and depleting this great natural resource of the state; that the entire gas area of the state is found in oil producing sand, and that the experience of all natural gas fields demonstrates that gas found in and taken from such sand (page 108) is of much shorter duration than that found in purely gas sand. A further more specific description appears on page 109. Further, on page 108, it is stated that

> "The natural gas of the State of Oklahoma is found in a gas and oil producing sand, extending underneath large contiguous areas of land and that every well reaching into said gas sand takes from this unbroken area and thereby diminishes the producing capacity of any other well and of the entire field."

On page 109:

> "In case the kind of pipe line proposed by plaintiff is constructed no further development of the natural gas business in the state so far as the supply of cities not now obtaining the same, will in reason be accomplished, and because of the relative smallness of the present lines to Oklahoma City, Guthrie, and Shaw-

nee compared to plaintiff's proposed lines, will in the immediate future leave said cities without natural gas. That because plaintiff may outside the State of Oklahoma erect enormous pumping stations which they are now actually in the process of constructing, they might reasonably and would inevitably render entirely useless all the present lines in Oklahoma, and take away from the towns and cities of Oklahoma the entire practical use of their sole and natural fuel, because when gas is removed by the limited, prudent and natural rock pressure the nature and formation of the gas and oil sand is not radically changed, but if large pumps to pump out the wells out of proportion to the rock pressure are used, as are now actually threatened by the plaintiff, the gas and oil sand is actually broken down as though shot with dynamite or other violence, and the salt water thereunder, always to be found, at once drowns out the wells, where rock pressure has been too greatly or rapidly decreased."

On page 110 it will be noticed that

> "The developed gas belt of the State lines principally within Osage, Washington, Nowata and Rogers Counties."

From the map of the known productive fields compiled by David T. Day which accompanies the said Geological Report for 1908, part 2, it will be noticed that there are in Oklahoma practically three gas fields. First, a gas field that extends from Kansas down into Oklahoma, then a gas field situated southwest of and below the first gas field named, the second gas field called the "Hogshooter Field," and third, a gas field south of the Hogshooter Field called the Collinsville Field, but in that the oil wells sink down to the Mis-

sissippi Lime, they will necessarily be more or less connected through the oil wells wherever they overlap. I have not been able to find in any written authority a description of this oil fields to which I can refer the court, if I may be permitted to state my understanding outside of the record and to explain the conclusions of fact herein found, it is as follows:

The oil in Oklahoma occurs in oil and gas sand as it does in Pennsylvania, West Virginia, and Ohio,—not as in Indiana, where the oil and gas are in the Trenton-rock, nor as it is in California, Mexico and Texas, where it is in a gravel. The strata all dip to the south and west as they do from Pennsylvania west, though the dip in Oklahoma is greater than in Pennsylvania, being about thirty-three feet to the mile. The Mississippi Limestone which is the lowest formation yet reached by these wells, being at Bartlesville about 1400 feet, is 900 feet thick at Neodasha, Kansas, where it has been penetrated, has immediately above it a gas sand, but this gas sand is not a dry gas sand as that found in Pennsylvania and West Virginia, but is a gas sand full of water, as that found in Indiana in the Trenton-rock. About 100 feet above this gas sand is an oil sand containing gas, that is, at a depth of about 1250 feet. This is called the Bartlesville Field. At about 850 feet occurs the Oswego Limestone. The Oswego Lime is the only uniform stratum, which dips continuously through the entire field at thirty-three feet to the mile, dipping about equally to the south and west. It outcrops at Oswego, Kansas. About 100 feet above the Oswego Lime is an oil and gas sand called the

Peru Sand. About 100 feet above it is a dark limestone, called the "Big Lime." Its top at Bartlesville is about 650 feet from the surface. 200 feet above the Big Lime is what is called the "shallow sand." The gas sand immediately above the Mississippi Lime is the Hogshooter. The Hogshooter sand underlies most of Washington and Nowata Counties. The gas pool that extends therein from Kansas is coincident with the Bartlesville sand at 1400 feet at the Hogshooter Field. There is also gas in the Bartlesville Field at 1220 feet, with oil under it and salt water under that. There is no oil to speak of in the Hogshooter Field and the gas there occurs with considerable uniformity. The gas pressure there is naturally 500 pounds. Southeast of Bartlesville is the Collinsville Field of about 15,000 acres. The Bartlesville Field, 1200 feet deep at Bartlesville, is about 800 feet deep at Nowata and Delaware. Forty miles south and west of Bartlesville, the same field is 2,300 feet deep at the Glenn Pool south of Tulsa. The Peru sand, between 650 and 750 at Bartlesville, occurs also at Peru, Kansas, for which it is named. In the Osage, thirty miles south, it is at a depth of 1500 feet. In the Glenn Pool there is the celebrated Glenn sand, apparently a stray sand about 100 feet from the Red Rock sand, which in the Glenn Pool is at a depth of 1500 feet and at Tulsa is at a depth of 800 feet, the Red Rock sand and what is called the "shallow sand" at Bartlesville being apparently the same thing. Whether or not these fields are connected is uncertain, but at least it is certain that the same strata occur more or less in each

of them, and there is, therefore, the danger that if one field is flooded, in a short while all will be in the same condition. Nor is the danger from flooding a danger of the imagination only. In Kansas at the present time it is thought that the wells there could produce for market 400,000,000 cubic feet a day provided it was safe to pump them, but the rock pressure having been so reduced in Kansas the salt water stands so near the gas that is in the well that it is apparent that the creation of the vacuum that is in the well will flood it with salt water at once, and where a well is flooded it destroys the oil as well as the gas, the oil and water forming a useless emulsion, or else the water takes possession of the well and prevents the oil coming in. For instance, in the Hogshooter Field a company recently bought a well good for 10,000,000 cubic feet of gas daily, with 450 pounds rock pressure. The well was connected with a line which had a compressor in Kansas. In less than two weeks, by reason of the forced draft on the well, the rock pressure was reduced so that the water flooded out the gas well and practically destroyed it. If the wells are allowed to flow free, or if a vacuum is created in them, which has the same effect as allowing them to flow free, it is inevitable that they will be flooded by the salt water and the oil in them destroyed as well as the gas. Nor does the injury stop there; the oil fields being all of them connected at certain levels, although not at all levels, perhaps, the destruction of the oil in wells by salt water will inevitably, where the condition exists in sufficient quantity, lead to the destruction of the

entire oil industry as well as that of the gas. Van Hise, in his book on the conservation of natural gas (The McMillan Company, 1910) at page 56 says that it is impossible accurately to estimate the amount or the future life of natural gas, but it is certain to be short. The experience of the other gas fields shows that we can expect its use but a short time. At page 58 he said that nearly all oil wells are also gas wells. Whether the State has therefore, the right to conserve its use as well as prohibit one of the common users from using it to the detriment of the other common users and also threatening the destruction of the oil industry, is well stated by Van Hise on page 52 of his work with reference to the conservation of the petroleum industry, in these words:

> "At the present time more than one-fifth of the petroleum taken from the ground is exported. The question should be raised as to whether exportation of a product which is likely to last so short a time should be permitted. It has become almost a maxim with us in this nation that the thing to do is to develop and use our natural resources as fast as possible. In general the men who have taken possession of and exploited rapidly our resources, have been commended for developing a new country. This view has had a certain justification in the past, but the time for preaching such a doctrine in this country has now passed. With reference to each of our natural resources, the question should be now asked as to whether it is wise to encourage further exploitation, or on the contrary to reduce the draft upon the product. It seems to me that in the case of petroleum the answer is clearly that not only should an increased rate of exploitation cease, but a decreased rate should be demanded. This generation

should leave in the ground as much petroleum as possible, in order that succeeding generations may have the advantage of this most valuable product for those special purposes for which it is absolutely necessary."

This brings us to the question of the right of the State to exercise the power of conservation.

EXPERIENCE OF OTHER FIELDS.

The experience of other fields is part of it to be found in the work of Van Hise, *supra*, and the various papers of B. Hill, William T. Day, and papers and speeches of Dr. I. C. White, State Geologist of West Virginia.

In addition to that it may be said that the experience of Kansas was that its gas field was depleted within two years from the time that the large pipe lines and compressors were connected with the gas wells. The record admits that the Kansas field is depleted (Rec. p. 4).

The strata in Kansas were like those in Oklahoma except, of course, they were found there nearer the surface, but substantially in the same form as at Bartlesville.

In Indiana, as I have said before, the gas and oil were found in the Trenton sand rock. (See Ohio Oil Co. vs. Indiana, 177 U. S. 196.) This sand rock dips from the north to the south and west, as in Oklahoma, and also waves as does the surface of the ocean; however, in much more exten-

sive and deeper heights and depressions. In the Trenton rock gas, oil and salt water occur as in Oklahoma and Kansas. They occupy a relative position in the order of gas, oil and water, because of their relative specific gravity. Therefore, if a well should reach a point about the top of the rock wave, it there would be gas well; if it reaches a point about the middle of the rock wave, it would be an oil well; if it should however, reach a point in the valley or trough of the rock wave, it would be a salt water well, and if the first well instanced is drilled in further, it will reach the oil deposit, and if drilled still further, the salt water will be reached.

When these wells were first discovered, it was thought that they were inexhaustible, (See Shafer, Natural Resources of the United States), and the struggle began to use it. Vast factories came in and the pipe lines were built to the big cities of Chicago, and elsewhere. It was rapidly developed, and the rock pressure rapidly reduced.

It has often been said by those having a theoretical or paper knowledge of the subject, as distinguished from the scientific investigation of facts, that it was the enormous use of the gas in unrestrained lights burning by day, as well as the reckless waste of it into the air in the acquisition of oil, that depleted the field. But about this there must be grave doubt. The fact is the wells always continued to produce gas and oil until salt water showed in them, but salt water proving to be the death warrant of the wells. The

phenomenon of the "eternal fires of Baku," and the fact that such naturalists as Shafer thought the supply inexhaustible, when coupled with the very long, very wasteful use in Pennsylvania, where there was no salt water, or little, in the sand, leads one to believe that it was the flowing in of the salt water, rather than the waste of the gas at the vent, either lighted or unlighted, that caused this destruction.

I can find nothing adequate written by the geologists, but the oil fraternity who almost in a body have followed the development of gas and oil in the United States from its inception, are very many of them of the opinion that it is the presence of salt water and its hydrostatic pressure that produces both oil or gas gushers; that the same water extinguishes inevitably in the end every large gusher.

When we consider the compressibility of water, that as a pillar of great force it stands under the oil and gas to force them to the surface, when the vent is made, we have on such a hypothesis the only reasonable account of oil and gas gushers, and also a reasonable theory why the salt water is so feared.

In Indiana, however, the salt water came in with the rapid development, intermingled with the oil, formed a useless emulsion, and drowned out the wells in a very few years, destroying both the gas and the oil industry in that state.

In Pennsylvania and West Virginia the conditions were different. Not only because in those states there are many

sands instead of only the one Trenton rock, as in Indiana, but also very little salt water, and some sands very deep that have shown as yet no water at all. Therefore, by care in drilling and putting in the plugging of abandoned wells, a minimum of waste is possible, and the gas supply in Pennsylvania, Ohio and West Virginia will probably furnish consumption for fifty years to come.

But Oklahoma presents peculiarly the characteristics of Indiana and is rapidly going the way of that state.

As said before, in Oklahoma, Washington and Nowata counties are underlaid with two gas strata, the Bartlesville Sand and the sand immediately above the Mississippi Lime Sand known as the "Deep Sand."

In Indiana after the gas was discovered in large quantities, large gas consumers were located in the State and built up the towns. Then the promoter came, attempted to pipe the gas out of the state to sell at a profit and within a few years Indiana became a state of dismantled factories and silent business, from which it has never recovered.

Here in Oklahoma, the people and the business of the state are fighting to conserve the gas for future domestic use. It is a public business, and under the laws of the state no public business may be appropriated with discrimination. All in the state must be treated alike. (Section 8812, Compiled Laws of Oklahoma, 1909, Snyder.)

Upon what theory, therefore, could the promoter, be authorized to spawn his West Virginia, New Jersey and Delaware corporation to take away from the state its only adequate fuel supply, and render it a land of dismantled factories? Only in case the state is entirely without the power to conserve its needed fuel.

Already in the north end of the field the rock pressure is very much lowered, and little gas can be furnished, so, as pleaded in the answer, the lines are gradually extending south, (p. 110).

If the power of the State cannot be exercised in the direction contemplated by these statutes, Oklahoma, like Indiana must become a state of silent industries and crippled institutions.

CONSERVATION AND INTERSTATE COMMERCE.

Against the demands of the State of Oklahoma to conserve thus its only fuel, it is replied on the other side that if Oklahoma gets iron from Pennsylvania, it cannot refuse to allow its gas to be taken to Pennsylvania.

The conditions, however, are not the same.

In the case of Noble State Bank v. Haskell, this term,

this court affirmed that the proper exercise of police power contemplated the successful operation of commerce, and upheld the banking legislation as an attempt to benefit the banking end of the commerce of the state.

Certainly no state can develop without fuel. The comparison of Oklahoma gas with Pennsylvania iron, therefore, fails in this. It is not contended that without iron the industries of Pennsylvania would be demolished. It is contended that without gas, until, at least, the oil industry is further developed, and oil engines are further perfected, Oklahoma would be without fuel, that is, without manufacturing industries.

The case narrows itself to the single question of whether in any event a state has the right to conserve its natural resources, and second, has it the right to preserve a common supply for the equal use of all those who may by law resort to it.

This second question has been recently answered by this court in case of Linsley vs. Nat. Carb. Gas Co., this term, and the Ohio Oil Company v. Indiana, but as to the first proposition, we claim that where special conditions of geography, geology or climate exist, that special police regulation to suit those conditions for the public welfare may be enacted.

That the police power may be justified by special climatic conditions was recognized most fully by this court in the

sheep case, (Bacon v. Walker, 204 U. S. 311), and in the irrigation ditch case, (Clark v. Nash, 198 U. S. 361).

That geographical conditions might exist justifying a peculiar exercise of the police power, was recognized in

The aerial right of way case (Strickley v. Highland Boy Gold Mining Co., 200 U. S. 527),
And in the case of Offield v. N. Y., N. H. & H. R. R. Co., 203 U. S. 372,

where the geographical conditions necessitating the improvement and consolidation of a certain road, solely able to connect New England with New York, were recognized as justifying a peculiar law.

Likewise, in the case of

Ohio Oil Co. v. Indiana 177 U. S. 190,
and Linsley v. Natural Carbonic GaGs Co.,

this term, peculiar geological, as well as peculiar qualities attaching in the one case to oil and gas, in the other case to water and gas, were marked by the court as having a peculiar and distinct effect upon the general rights ownership and operation.

The peculiar condition of the State of Oklahoma in relation to natural gas, justifies in Oklahoma, perhaps, a peculiar police law for its preservation, and one which perhaps on this ground might not be justified in other states with sufficient other adequate fuel. The necessity for the police power, therefore, appearing, can it be said, that its exercise in this instance is against the trend of judicial authority?

Upon this subject I desire to refer to a very excellent article in the University of Pennsylvania Law Review for December, 1909, under the name of "Conservation of Our Natural Resources and of Our Natural Strength of Virility," by A. A. Bruce.

POLICE CONSERVATION OF WATER IN CALIFORNIA.

But a case of peculiar significance is that of

Katz v. Walkinshaw (Cal.) 64 L. R. A. 236.

This case recognizes that the peculiar qualities of water, as distinct from other metallic minerals, in this respect similar to oil and gas as opposed to stone and coal. The case also recognizes the geographical and climatic conditions of the arid portion of California as justifying a different law from those in the well watered portions of England, and points out the reason why peculiar police power may lie in Oklahoma to preserve natural gas as its sole adequate fuel supply.

A very vivid account of that case I take from the "Saturday Evening Post," of October 23, 1909, part of which is reproduced herein, for we believe that the author has analyzed the case in a manner which will show the application of the principles involved to the case at bar:

"Among those in the San Bernardino Valley who put down wells on their land, pumped more water than they could use and sold the surplus in orchards located on dry land far away, was Margaret Walkinshaw. Not far from her place an artesian well had been spouting water on the Katz ranch for twenty years. When that gusher went dry and scores of artesian wells in the vicinity were overtaken by the same fate, Katz and other owners of land over the subterranean basin became alarmed. Week after week they saw more gushers cease flowing, more of the water they depended upon for the life of their crops taken away by private persons and corporations to be sold at a profit in districts without artesian water. Haunted by the fear of losing their only supply for the benefit of those making money out of the sale of the concentrated rain stored underground, the ranchers united in an effort to keep the water at home. They brought suit to stop the sale to distant orchards of water pumped from their artesian basin.

"They selected the Walkinsaw wells as the point of attack. The Superior Court had no hope for them; precedents based on the common law were against them, and they lost. But the Supreme Court of California, recognizing the pressing necessity of radical action, cut loose from precedents, lightened ship by throwing overboard the common-law rules regarding ground water, put the helm down and started off on an independent course. By a bold stroke it changed the fundamental ground-water regulations and brought into being a new legal doctrine born of the distress of Katz and his fellow-ranchers, a doctrine that put a sudden stop to speculation in ground water and effectively protected the owners of land over artesian basins.

"India, the home of irrigation, waters more land from wells than from running streams; the Dakotas, Nebraska and Kansas depend almost wholly upon artes-

ian water for irrigation; throughout the region of deficient rainfall well water is coming into greater use and gaining in importance every year. When these facts are considered, when it is remembered that the water available for gravity systems, the flow of the streams in the West, has practically all passed into the hands of individuals and corporations the full import of the protection afforded the poor man's rain in the West, the ground water, can be appreciated. The decision in the Katz-Walkinshaw case stayed the hand of the speculator and of the corporation eager for the possession of the vast underground water resources beyond the Missouri, and in the decades to come the new rule will prove of incalculable benefit in the orderly development of the country's arid half.

"The law recognizes two distinct species of underground water: Subterranean streams having defined, permanent channels through which the water flows in a definite course, and percolating or ground water, moisture seeping in from the surface and filling the voids between the particles of soil, sand and gravel, having no defined channel or definite direction of flow. To the first kind of underground water, to the subterranean streams, all the regulations governing the use of surface streams are applicable. No matter how deep these underground rivers go, they remain streams so long as they have a defined channel, banks and a definite course. Their water may be claimed by the first arrival on their banks, or it may be reserved for riparian proprietors. But for the use of percolating water, of water standing idly in the ground without a visible sign of moving on or striving toward a certain goal, for the use of such lazy, lifeless water a different rule has been devised by the English courts. Acting on the theory that the almost imperceptible movements of the ground water were occult, hidden from human understanding and could never be known, and that, therefore, this water was

part of the soil, the English courts gave the owner of the soil the right to do with it what he chose. He could pump it and drink it, or bottle it, let it run to waste or sell it, just as he could remove and sell sand, gravel, minerals, ore and oil out of the ground owned by him. The owner of the land was the owner of the percolating water 'down to the center of the earth' in the language of the law, if he desired to go after it that far. Happily, the question whether he has the right to invade the hinterland of the antipodes has not been raised so far. With the Mayflower, and subsequent English importations, this legal rule came across the Atlantic. It held sway in the irrigation country for many a year, a more solid, more time-worn tool of the justice shops than the riparian right. Upon this doctrine Mrs. Walkinshaw relied when Katz attempted to keep her from pumping water out of her own land for sale at distant points having no supply of their own. Katz and his attorneys did not question the efficacy of the percolating water doctrine. Its hold upon their minds was too firm to admit of any doubt of its sacred origin. They simply attempted to prove that the water Mrs. Walkinshaw took was not ground water, but part of a defined underground stream, and they invoked the equally sacred doctrine of riparian rights to stop her from selling the imaginary stream's water for use on distant, non-riparian lands.

"The district judge, after listening for many days to the brilliant array of water experts, geogolists and hydraulic engineers who swamped him with evidence concerning strata folds, faults, deposits of impervious clay and other theories, in an effort to prove or disprove, according to their respective interests, the existence of a defined stream, found that the moisture in the Walkinshaw land was percolating and not running water, and that, therefore, the owner had a perfect right to do with it as she pleased.

"The Supreme Court passed over the questions of fact, but when it arrived at the conclusions of law, the venerable tribunal took the bit in its teeth and picked to pieces the lines and traces of mildewed legal precedents. When it finished and calmed down, the doctrine of the absolute ownership of percolating water was a wreck. Right out loud it declared its independence of the tight little isle in rules concerning ground water and framed a substitute for them to fit conditions on the limitless dry plains of the West.

"Subjecting water to a critical examination the court found to its surprise that water differed radically from sand or gravel. It discovered that a man may remove sand and gravel by the ton from his land without affecting his neighbor's supply. The only result of the removal was a hole in the ground. The court also discovered that water, unlike sand, has a habit of seeking its level, and that it is extremely difficult to maintain a hole in a body of water. From these startling, novel facts the court concluded that the removal of water from one part of an under ground reservoir, the English courts notwithstanding, must lower the water plane in other parts of the reservoir. Given a sufficiently powerful pumping plant, it was perfectly feasible for the owner of a few acres to drain the entire artesian basin, sell all the water, pocket the proceeds and leave all other land above the empty reservoir high and dry. In the words of the Supreme Court: 'It is an anomaly in the law if one person can, for his individual profit, destroy the community and render the neighborhood uninhabitable.'

"The lower court's decision was reversed. The Walkinshaw pumps might keep on sucking up moisture, but water could not be sold outside the limits of the artesian basin or its watershed. Many square miles of orchards worth millions of dollars were assured of a permanent

supply and the doctrine of correlative rights in ground waters was established. Texas still clings to the absolute, irresponsible ownership of percolating water, but most of the other arid states have followed California's lead. * * *

"Spring water has been a prolific source of quarrels and lawsuits in the West. After feasting his eyes on its pure, cold flow, the owner of a spring might retire at night only to find it gone in the morning, caught by the settler on the land above. Owner number one had no redress. His neighbor was well within his rights when he dug trenches and tunnels on his own land, intercepted the ground water on its slow way to the spring below and used it. Neither had owner number two reason to complain when the settler on land still higher repeated the trick, and by the same means, gathered the percolating water to his bosom, only to see it pass in turn into the hands of settler number four on the highest point of the slope down which the water seeped, bound for the spring. Within the city of Pasadena five water-tunnels were dried up successively, the same water changing hands five times before the owner of the highest land gained permanent possession of it.

"Previous to the Katz-Walkinshaw decision the owners of the Cucamonga springs, in Southern California, had to stand by idly and watch the flow of their springs decrease from four hundred inches to four, the moisture, worth three hundred and ninety-six thousand dollars, traveling to the orange orchards of the neighboring town of Ontario instead of irrigating the Cucamonga vineyards as theretofore. At least, the Cucamongans presumed that their water was going to Ontario's ditches. For many years their springs had furnished a supply unvarying in seasons of drought or deluge, steady and regular, until the company handling Ontario's water bought a tract of land not far from

the springs, bored wells and began to pump. Simultaneously the Cucamonga springs showed signs of declining health and never recuperated. A lawsuit followed, of course. Its trial lasted two months and a half, with a prospect of several years more of litigation before the inevitable appeals are disposed of. Ontario denied that its wells were carrying off the lost, strayed or stolen water of the Cucamongans and, as usual, armies of water experts and geologists were rushed to the front by both sides. Under the old rule concerning ground water, the chance of saving the spring was slim. The new doctrine may help to restore them to their former vigor."

(A) CONSERVATION AS APPEARING IN THE DECISIONS.

A statute of Utah was passed for the conservation of the strength of the vitality of man by restricting the hours of labor to eight hours a day except in cases of emergency as to underground workers and metal workers. The Supreme Court of Utah made the following observation, which was quoted with approval by Mr. Justice Brown for this court (Holden vs. Hardy, 169 U. S. 366 at 397):

> "The State still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the State must suffer."

If this is true about the very personal liberty of the citizen, surely a guardianship over his property is not to be denied.

A conservation statute of the State of Virginia to preserve its oysters by confining their taking to citizens of that state was upheld in

McCready vs. Virginia, 94 U. S. 391.

A statute of Massachusetts to preserve menhadden fish was upheld as a reasonable regulation for the common benefit of the right to take fish.

Manchester vs. Massachusetts, 139 U. S. 240.

A conservation statute of Connecticut for the preservation of game, prohibiting their killing for the purpose of transportation in interstate commerce, was upheld by this court in

Geer vs. Connecticut, 161 U. S. 519.

A conservation statute of Indiana to preserve oil or gas by forbidding the flowing of gas or oil in the open air was upheld in

Ohio Oil Company vs. Indiana, 177 U. S. 190.

It was asserted in the opinion of this court, p. 210, that the power existed in the state to prevent one seeking to convert undue proportion of the common supply or to waste it.

The right of the State of Kansas to protect its supply of water for irrigation purposes was upheld in

Kansas vs. Colorado, 185 U. S. 125.

A statute authorizing dams to reclaim swamps, though it flood the land of other owners who may protect themselves by dikes, was upheld in

Manigault vs. Springs, 199 U. S. 473.

The right of the State of Georgia by litigation to protect its atmosphere and forests against results of smelting business conducted in Tennessee was affirmed in

Georgia vs. Tennessee Copper Company, 206 U. S. 230.

A statute of New Jersey seeking to conserve its drinking water by prohibiting its diversion from the natural bed and conveyance by pipe line out of the state was upheld by this court in

Hudson County Water Company vs. McCarter, 209 U. S. 349.

It was said, page 357:

> "We are of the opinion, further, that the constitutional power of the state to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the question of present or speculation as to future needs. * * * It finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will."

The statute of a state prohibiting the introduction of game lawfully killed in another state was upheld in

New York ex rel. Silz vs. Hesterberg, 211 U. S. 31.

A statute of the State of New York prohibiting the use of pumps for the taking of gas charged waters for the purpose of separating the gas from the water and then vending gas was upheld by this court in

Linsley vs. Natural Carbonic Gas Company, at this term.

(B). RESTRICTED OWNERSHIP.

Further, there is such a thing as restricted ownership. Because of its fugitive nature, an owner of oil and gas cannot do with it as he pleases except subject to limitations and the rights of others. Affirmed in

Gas Company vs. Turner, 131 Indiana, 277;
Ohio Oil Company vs. Indiana, supra,
and Linsley vs. Natural Carbonic Gas Company, supra.

In Hudson County Water Company vs. McCarter 209 U. S., at page 357, it was said:

> "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject-matter. Knoxville Water Company vs. Knoxville, 189 U S. 434; Manigault vs. Springs, 199 U. S. 473."

(C). CASES IN THE STATE COURTS ON CONSERVATION.

A statute prohibiting the use of artificial means to increase the flow of natural gas was upheld in Manufacturers Gas Company vs. Indiana Natural Gas Company, 159 Ind. 467, 50 L. R. A. 768.

A statute of the State of Indiana conserving the natural gas of the state by prohibiting the exercise of eminent domain to companies transporting the same out of the state was affirmed in

Consumers Gas Company vs. Harless (Ind.) 29 N. E. 1062.

A statute of the State of Indiana conserving the gas by prohibiting its wasteful burning was upheld in

Townsend v. State, 154 Ind. 624, 47 N. E. 19.

This decision was followed by

Givens vs. State (Ind.) 66 N. E. 750.

Likewise, a statute prohibiting the escape of gas into air was upheld in

State vs. Ohio Oil Company (Ind. 49 N. E. 809.

A statute prohibiting the transportation of natural gas through pipe lines at a greater pressure than three hundred pounds a square inch was upheld as in violation of the in-

terstate commerce clause or the Fourteenth Amendment in Jamison vs. Indiana Natural Gas Company, 128 Ind. 555.

The rules seem well expressed in the following:

> "A restriction of the use of a common supply must be based either upon reasonableness of necessity for it, or such restriction must apply to a use not connected with the land upon which the common supply is found."
>
> Forbell vs. N. Y., 164 N. Y. 522; 58 N. E. 644.

The same ruling is followed in the following:

> "A statute of the State of New York providing that the method of reducing the common supply of gas charged waters must be natural and reasonable and not wasteful."
>
> Hathorn v. Natl. Carb. Co., 87 N. E. 504.

It was held that the prohibition of such pumping for the purpose of extracting gas from the water for gas was constitutional. The landowner, it maintained, had no vested right, unnatural or unreasonable, to force the flow of percolating waters for any purpose not connected with the use or enjoyment of this land. Only can the owner have an unlimited use of it for a purpose connected with it for the use of its land.

The right of the State of New Jersey to preserve by litigation its drinking water by preventing the use of the

bed of its river for the laying therein of a pipe line for the conveyance of the water out of the State was affirmed in

Wilson vs. Hudson County Water Company (N. J.)
76 Atl. 560.

A statute limiting the height of buildings was affirmed in

Welch vs. Swasey, 193 Mass. 364.

Legislation prohibiting the erection of wooden buildings, affirmed in

Wadleigh vs. Gilman, 12 Maine, 403.

Legislation prohibiting the erection of wooden buildings, even though the erection was begun before the passage of the act prohibiting it, was affirmed in

Salem vs. Maynes, 123 Mass. 372.

A statute authorizing the destruction of buildings without compensation to prevent the spread of fire was affirmed in

American Print Works vs. Lawrence, 23 N. J. Law, 9.

A statute prohibiting the further use of buildings for the purpose of brewing beer, even though beer was to be used solely in interstate commerce, was upheld in

Mugler vs. Kansas City, 123 U. S. 623.

Prohibiting spite fences:

Karasek vs. Peters, (Wash. 50 L. R. A. 345;
Smith vs. Morse, 148 Mass. 407.

See notes to Letts vs. Kessler, 40 L. R. A. 177, as to legislation of this character.

Legislation prohibiting owner from allowing weeds to grow on his own land, affirmed in

St. Louis vs. Gault, 179 Mo. 8, 63 L. R. A. 778.

Legislation limiting the quantity of land any family or person may cultivate within city, affirmed in

Summerville vs. Presley, 33 S. C. 56.

Legislation prohibiting the flow of water from a private artesian well except for irrigation and domestic purposes, prohibiting the vending of such water because of the climatic conditions was affirmed in

Katz vs. Walkinshaw (Cal.) 63 L. R. A. 326.
Ex parte Elam. (Cal.) 91 Pac. 811.

Legislation prohibiting the taking of oysters beyond certain limits of amount was affirmed in

Windsor vs. State, 64 Atl. 288.

The right of the State to limit or prohibit the cutting of trees upon waste or uncultivated land was affirmed in

Questions and Answers, 103 Me. 506.

The right of the state to prohibit the taking away of stone, gravel or sand from the beaches protecting Boston Harbor was affirmed in

Commonwealth vs. Tewksberry, 11 Metc. 55 (Mass.)

(D).

Those cases which appear to limit or deny conservation powers because of the due process clause or interstate commerce are all cases in which there is no suggestion, or, at any rate, the facts are not found or asserted showing the necessity for conservation. They are as follows:

Indiana vs. Indiana and Ohio Oil, Gas & Mining Co., (Ind.) 6 L. R. A. 579, 120 Ind. 575.

In this case the court found no element of conservation, but only a purpose of prohibiting interstate commerce. There was no allegation or suggestion of the limited supply and an unlimited demand in the state.

In the case of Manufacturers Oil & Gas Company vs. Indiana, Indiana Decisions, 53 L. R. A. 135, the decision is distinctly predicated on the lack of allegation that the appellee was appropriating an undue proportion of a common fund or supply of gas, or was using any device or artificial means to produce a natural flow from its wells to the injury of the appellants.

In Rosmiller vs. State, 89 N. W. 838, reconciliation may be effected with the decisions of this court upon a consideration that therein was no evidence or suggestion or argument that there was not enough ice and to spare, and that the exportation thereof threatened either the water supply or the health of the people of the state.

Likewise, Hague vs. Wheeler, 157 Pa. 324, 27 Atl. 717, while asserting that an individual can enjoin another individual in the kind of use made by the latter of the gas found on his land, yet it is asserted that the owners of the land are offering a common gas supply and that the public has the right to conserve that supply, though an individual cannot do so without public authority.

SECOND.

THE ACT IS VALID AS AN EXERCISE OF THE STATE'S POLICE POWER IN THE CONTROL OF ITS HIGHWAYS FOR TRANSPORTATION PURPOSES.

(A) THE STATE'S HIGHWAYS ARE ITS PUBLIC PROPERTY.

The nature of the state's control over its highway was considered by this court in St. Louis vs. Western Union Tel. Co., 148 U. S. 92, 13 Sup. Ct. Rep. 485, where an ordinance of the city imposing a charge of five dollars per pole on all of the telegraph company's poles was sustained, notwithstanding the fact that the city streets were post roads, and that, by the act of 1866, the telegraph company was authorized to construct its line upon post roads. The court held that this right granted by the act of Congress carried no right of way over land owned by the city, and in the opinion delivered by Mr. Justice Brewer, at page 101, it is said:

> "Although the state house grounds be property devoted to the public uses of the state, and property whose ownership and control is in the state, and it is not within the competency of the national government to dispossess the state of such control and use, or appropriate the same to its own benefit, or the benefit of any of its corporations or grantees, without suitable compensation to the state. THIS RULE EXTENDS TO

> THE STREETS AND HIGHWAYS; THEY ARE THE PUBLIC PROPERTY OF THE STATE. While for purposes of travel and common use they are open to the citizens of every state alike, and no state can, by its legislation, deprive the citizens of another state of such common use, yet when an appropriation of any part of this public property to an exclusive use is sought, whether by a citizen or corporation of the same or another state, or a corporation of the national government, it is within the competency of the state, representing the sovereignty of that local public, to exact for its benefit compensation for this exclusive appropriation. It matters not for what that exclusive appropriation is taken, whether for steam railroads or street railroads, telegraphs or telephones, the state may, if it chooses, exact from the party or corporation given such exclusive use, pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated."

This language of Mr. Justice Brewer is quoted with approval by Mr. Justice Harlan in delivering the opinion of the court in

> Richmond v. Southern Bell Tel. Co., 174 U. S. 746, 19 Sup. Ct. Rep. 778, 782.

In Memphis v. Postal Tel. Cable Co., 139 Fed. 707, it is said in the syllabus:

> "The streets and alleys of the city of Memphis are public property, that which the State of Tennessee, as sovereign, has the right of absolute control, and with respect to which the city, which is the creature of the Legislature, can exercise only such powers as have been granted by the Legislature, which are limited generally

by its charter to the enactment of ordinances not in conflict with general laws."

In 3 Elliott on Railroads, 2nd Ed. Par. 1076, the author says:

> "The Legislature of the state represents the public at large and has paramount authority over its public ways, including the streets in cities as well as country roads."

(B) THE RIGHT TO USE THE HIGHWAY IN MAINTAINING A GAS PIPE LINE—A PERMANENT PLANT—IS A FRANCHISE.

In New Orleans Gas Light Co. v. La. Light & Heat Co., 115 U. S. 650, 6 Sup. Ct. Rep. 252, it is said in the syllabus:

> "The manufacture and distribution of gas by means of pipes, mains and conduits, placed, under legislative authority, in the public ways of a municipality, is not an ordinary business, in which every one may engage, as of common right, upon terms of equality, but is a franchise relating to matters of which the public may assume control, and, when not forbidden by the organic law of the state, may be granted by the Legislature, as a means of accomplishing public objects to whomsoever, and upon what terms, it pleases."

In State vs. Cincinnati Gas Light & Elec. Co., 18 Ohio State, 262, 292, it is said:

> "We think it cannot be doubted that the right to use the streets of a city for the purpose of laying pipes to convey gas, whether in the hands of a private corporation or a natural person, is a franchise, and as such can only emanate directly or indirectly from the sovereign power of the state."

In Jersey City Gas Co. vs. Dwight, 29 N. J. Eq. 242, 248, 249, it is said:

> "This is a right which sovereign power alone can confer. The rule must be considered settled that no person can acquire a right to make a special or exceptional use of a public highway, not common to all citizens of the state, except by grant from the sovereign power."

And again (249):

> "The right to use the public streets of a city for the purpose of laying gas pipes therein is, in my opinion, a franchise which the state alone can confer."

In Purnell v. McLane (Md.), 56 Atl. 830, it is said in the syllabus:

> "The use of streets of a municipality for delivering electricity to the consumer is a franchise, and the manufacturer cannot make such use of the streets without the permission of the state or the municipal government, acting under legislative authority."

In Pittsburg, etc., R. R. Co. v. Hood, 94 Fed. 618, in an

opinion delivered by District Judge Clark and concurred in by Circuit Judges Taft and Lurton, it is said on page 621:

> "The public landing on which the accident occurred is a public highway in the fullest sense and must be so regarded for all legal purposes, and the right to occupy such a public highway with a railroad is an extraordinary privilege. Legislative authority must exist to warrant the occupation of such a highway by express grant or by necessary implication. * * * Such unauthorized occupation and use of streets and highways, being wrongful, not only creates a nuisance, but constitutes a railroad company a trespasser."

The reasoning by which to determine whether any particular use of a highway is one open to the public as a common use, or one which can only be exercised by the consent of the public—a franchise—is well stated by Mr. Justice Brewer in the opinion in City of St. Louis v. Western Union Tel. Co., supra, as follows:

> "The use which the defendant makes of the streets is an exclusive and permanent one, and not one temporary, shifting and in common with the general public. The ordinary traveler, whether on foot or in a vehicle, passes to and fro along the streets, and his use and occupation thereof are temporary and shifting. The space he occupies one moment he abandons the next, to be occupied by any other traveler. This use is common to all members of the public, and it is a use open equally to citizens of other states with those of the state in which the street is situate. But the use made by the telegraph company is, in respect to so much of the space as it occupies with its poles, permanent and exclusive. It as effectually and permanently dispossesses the general

public as if it had destroyed that amount of ground. Whatever benefit the public may receive in the way of transportation of messages, that space is, so far as respects its actual use for purposes of a highway and personal travel, wholly lost to the public. By sufficient multiplication of telegraph and telephone companies the whole space of the highway might be occupied, and that which was designed for general use for purposes of travel entirely appropriated to the separate use of companies and for the transportation of messages."

Whether such a use of the highway is a common use or a franchise is, to a certain extent, a matter of state law, and one upon which the determination of the state courts is final. Kansas has held that a gas pipe line is a common use, and it has also held that a telegraph line is a common use; that they can be built without the consent of the state and without compensation to the abutting owners.

Kentucky has held to the contrary, and so have many other states.

The wide divergence of decision is illustrated by the telephone cases which are collected in a note at page 323, 3 L. R. A. New Series.

While these numerous conflicting decisions confuse the mind, and make it difficult to know what the law ought to be, they clarify this proposition. The question is one of state law, and, being purely local, the decision of the state court will be binding on this court.

Sauer v N Y 206 U S 536, 548.

This being true, we think the opinion of the supreme court of Oklahoma on rehearing in Foster Lumber Co. v. A. V. & W. R. R. Co., 100 Pac. 1110, settles the point under consideration. It is true that in that case it was a railroad track that was being considered, but there is no difference of principle involved as is shown by the opinion of this court in the case of St. Louis v. Western Union Tel. Co. quoted.

In the Foster Lumber Co. case, 100 Pac. 1113, the court quotes from Lewis on Eminent Domain with approval the following:

> "The railroad does not fall within the scope of such uses (common uses open to all citizens). It requires a permanent structure in the street, the use of which is private and exclusive. IT GIVES TO AN INDIVIDUAL OR CORPORATION A FRANCHISE AN EASEMENT IN THE STREET, INCONSISTENT WITH THE PUBLIC RIGHT. To hold that a railroad is one of the proper and legitimate uses of a street leads to the absurd consequences that a street might be filled with parallel tracks which would practically exclude all ordinary travel, and still be devoted to the ordinary uses of a highway."

This opinion of the Oklahoma Court is in conformity with the decision of this court, and at all events establishes the rule for this state.

(C) THIS BEING TRUE, THE RIGHT MUST EITHER BE ACQUIRED BY GRANT OR BY CONDEMNATION.

In Louisville Trust Co. v. City of Cincinnati, 76 Fed. 296, in an opinion delivered by Judge Lurton and concurred in by Judges Taft and Hammond, it is said on pages 308 and 309:

> "The right of the local authority to impose terms and conditions is clearly conferred, and no such corporation can impose itself upon the public streets or highways unless it enter into an agreement touching the occupancy of such streets or resorts to the right of condemnation in default of an agreement."

This language is quoted with approval by Mr. Justice Day in delivering the opinion of this court in Blair v. Chicago, 201 U. S. 400, 26 Sup. Ct. Rep. 437, 439.

(D) THE RIGHT HAS NOT BEEN GRANTED BY THE STATE, AND THE APPELLEES DO NOT ASSERT ANY RIGHT BY GRANT.

It is not necessary to argue this because the bills of the appellees themselves show that they have no grant from the state, and their whole claim is based upon a right to

use the highways without a grant, and in spite of the state's denial.

(E) THE RIGHT OF EMINENT DOMAIN IS NOT GRANTED TO FOREIGN CORPORATIONS. THIS RIGHT MAY BE LAWFULLY GRANTED TO DOMESTIC CORPORATIONS AND WITHHELD FROM FOREIGN CORPORATIONS.

We content ourselves with referring to the authorities cited under this subdivision in the condensed statement of the case and the doctrine is so well established that it is unnecessary to quote from those authorities.

We therefore have a case in which the state, in the exercise of this proprietary power over its highways, has not granted a franchise to the appellees, nor has it granted to them power to acquire this right by condemnation. They therefore are asserting a right which they do not possess and which they cannot acquire under the laws of the state.

(F) THE RIGHT OF EMINENT DOMAIN FOR PURPOSES OF INTERSTATE COMMERCE MIGHT BE GRANTED BY THE UNITED STATES.

Beale on Foreign Corporations, Sec. 115, note:
U. P. R. R. Co. v. B. & M. R. R. Co., 3 Fed. 106.

The complaint of the appellee is based upon the absence of a law granting them a privilege, and not upon the existence of a law taking from them a right.

They have just as much right to complain because the United States has not conferred upon them the right of eminent domain as they have to complain because the State of Oklahoma has not done so.

(G) THE RIGHT CLAIMED BY APPELLEES BEING A FRANCHISE AND NOT HAVING BEEN GRANTED EITHER BY THE STATE OR THE UNITED STATES, CANNOT BE EXERCISED WITHOUT CONDEMNATION AND AS THE POWER OF EMINENT DOMAIN HAS NEITHER BEEN GRANTED BY THE STATE NOR BY THE UNITED STATES, THE RIGHT CANNOT BE ACQUIRED BY CONDEMNATION. THEREFORE THE APPELLEES HAVE NOT THE RIGHT BY THE STATE'S VOLITION, NOR HAVE THEY THE POWER TO TAKE IT WITHOUT THE STATE'S VOLITION.

(H) THE APPELLEES CLAIM THE RIGHT BY GRANT FROM THE OWNERS OF THE ABUTTING LAND.

Their contention is that the fee in the highway is in the abutter, and that therefore he has the power to grant to them the right in controversy.

In the first place, we think the appellees are mistaken in claiming that the fee in the highway is in the abutter, as the rule in Oklahoma is to the contrary.

In the Foster Lumber Co. case, 100 Pac., at page 1113, the court say:

> "The fee in the street, in the case at bar, is in the public for street uses, and upon a vacation of said street the same would become the property of the plaintiff."

And again in the same case, on page 1114, in considering the effect of a franchise granted by municipal authorities, the court say:

> "It has only the effect to make that legitimate which would othewise be a nuisance and actionable as such."

In Guthrie v. Nix, 5 Okla. 555, the court say, at page 558:

> "The fee of the streets, including the sidewalks, is in the municipality, to be held in trust for the use and benefit of the public."

Whether or not the fee is in the public is a matter of state law, and this court will follow the state decisions.

Barney v. Keokuk, 94 U. S. 324.

In the second place it seems to us that, whether or not the fee is in the abutter is wholly immaterial in determining the question at bar, because, in the nature of the case, so long as a highway is a highway, it must be controlled by the state for highway purposes.

It seems to us that, on principle, the state must control its highways for transportation uses. One portion of a highway may be acquired by condemnation, while a connecting portion of the same highway may be acquired by deed and another connecting portion may be acquired by dedication.

Here is a case where a part of the highway is owned by the state in fee, while in another adjoining part the state only has an easement with the fee in the abutter.

Can it be possible that the state has any different control over the various parts of this continuous highway? It would appear on principle that, for transportation purposes, the state must control the highways regardless of the location of the fee, and that, in determining the question at bar, it is entirely immaterial whether the fee is in the abutter or in the state.

In fact this court, in Barney v. Keokuk, supra, has laid down the rule on page 229 of the 24 L. Ed.

> "On the general question as to the rights of the public in a city street, we cannot see any material difference in principle with regard to the extent of those rights whether the fee is in the public or in the adjacent land owners or in some third person. In either case, the street is legally open and free for the public passage and for such other public uses are as necessary in a city, and do not prevent its use as a thoroughfare, such as the laying of water pipes, gas pipes and the like, and, according to the laws of Iowa (which must be taken to govern the case), it may be occupied by those improved iron ways for public passage which modern skill has devised and which the advance of general improvement requires."

In this quotation we have two doctrines laid down which are of importance. One is that the location of the fee is immaterial. The other is that the laws of the state in matters of this kind must be taken to govern the case.

Sawyer v. 206 U.S. 536, 548.

The location of the fee being immaterial, the elaborate argument of counsel for appellees must fall to the ground.

The laws of Oklahoma "which must be taken to govern the case," establish by the very statute which is being attacked, as well by the decisions which have just been quoted, that these pipe lines cannot be constructed on the highways of the state without the consent of the state.

If the abutter can grant to the appellees the right to construct a pipe line in the highway, then he could refuse

the grant to all other persons, thus giving to the appellees a monoply in the highways. If the abutter can grant the right he can refuse the right and the result would be that the public would not control the highway.

The only case tending to show that the abutter can grant a highway use, which was cited below by the appellees, is Board of Commissioners of Hamilton County v. Indpls. Nat. Gas Co., 134 Ind. 209, 33 N. E. 972, but a careful examination of that case shows that it does not support the point to which it is cited, as the court says in the last paragraph of the opinion that the land owner "in the absence of legislation to the contrary" may permit an easement upon his fee in the highway.

In Oklahoma, however, the land owner does not hold the fee to the highway and here there is"legislation to the contrary."

If in the states where the fee is in the abutter, he may grant a right in the highway only "in the absence of legislation to the contrary," then it is of course true that in states where the fee is in the public that the abutter cannot grant such a right when there is legislation to the contrary.

It is true, of course, that the abutter has certain rights in the highway, but we believe there is no authority holding that this extends to a grant by him for a highway use to be exercised in violation to the laws of the state.

In State v. Kansas Nat. Gas Co. 80 Pac. 962 at page 963 the Court say:

> "It may be said that the gas company could not, and did not, as against the state, obtain from the abutting fee owners any right to use the public highway for any purpose. Its use belongs to the public and not to the owners of adjoining property. It is true, there are some privileges which such an owner may exercise for the betterment of the adjacent estate, but he has no power to transfer to another party any right to occupy the highway for any purpose."

In the syllabus in Morris etc. R. R. Co. v. Mayer, 10 N. J. Eq. 352, it is said:

> "The public rights in the highways of the state can be impaired or interfered with by nothing short of the authority conferred by the soverign power. That authority must be *expressly* given; or if conferred by *implication*, it must be a *necessary* implication."

This rule is conceded as to cities, but it is claimed that a different rule should apply to country highways.

This subject discussed in Lewis on Eminent Domain, section 91 e to 91 l.

In 91e it is said: 3 Lewis § 120.

> "As the country road of the present may become the city street of the future, it seems evident that the same rules must apply to both."

And in 91c Mr. Lewis says: 3 Lewis § 118.

> "There are now many city streets which were once country roads, but there does not seem to be any doubt

but what they are subject to the same uses and servitudes as streets newly established. According to Mr. Elliott, the moment a country road is brought within the jurisdiction of the city or town, the public easement forthwith becomes enlarged and extended by operation of law. If this is so, then something has been subtracted from the private property of the abutting owner, and added to the public easement without compensation. This is clearly contrary to the constitution, and, therefore, cannot be the correct view. The public can no more take, without compensation, an easement for the urban uses of highways, than it can take, without compensation, an easement for the rural uses of highways. It follows either that the public must have a very limited control and easement in country roads after they become city streets, or else that the easement is the same in both cases, and that the same principles are to be applied to both in determining what is a legitimate use. The latter seems to us the correct view, and the public easement may be defined as the right to use and improve the way for highway purposes, as the public needs demand. The public needs will demand a larger use in the city than in the country. But whatever the public needs demand in the way of legitimate highway uses, that the public have a right to enjoy. Whether a particular use or improvement is within the public right does not depend, therefore, upon whether the highway is in the city or country, but upon the nature of the use or improvement, that is, whether it is or is not within the legitimate purposes of a highway. Nor do the authorities afford much but dicta in support of the distinction asserted between urban and rural highways."

It seems to us that this reasoning is conclusive and that the public control over a country highway, whenever the

public deems it necessary, can be exercised in the same manner and to the same extent as its control over a city street.

If this is true, it ends the case because it is certain that a gas plant cannot be constructed in the streets of a city without the public's consent.

In Lincoln v. Commonwealth, 167 Mass. 1, 10, 41 N. E. 112, it was said by Mr. Justice Holmes, then on that bench:

> "When land is taken for a highway, all uses of the land directly or indirectly conducive to the enjoyment of the public easement which the necessity and convenience of the public may require, either then, or in the future, are paid for, wherever the highway may be."

The state's complete control over the country highways is asserted in Cheney v. Barker (Mass.) 84 N. E. 492, 16 L. R. A. New Ser. 436, where it is held as stated in the syllabus:

> "A pipe line for the transportation of gas is not an additional servitude on a public highway for which the abutting owners are entitled to compensation, although the gas is to be transported through the municipality, and is not intended for the use of its citizens."

In the opinion the following is quoted from Pierce v. Drew, 136 Mass. 75, 81:

> "It has never been doubted that, by the authority of the Legislature, highways might be used for gas or water pipes, intended for the convenience of the citizens,

although the gas or water was conducted thereunder by companies formed for the purpose."

And again it is said:

"It may be added that the Legislature often has exercised this authority, and we are not aware that it has ever been called in question."

This opinion, of course, does not state the law of Oklahoma concerning additional servitudes, because our statute declares a different rule, but the opinion recognizes as settled the doctrine that the pipe line can only be constructed under legislative permission, and as the appellees in the case at bar have no permission from the Legislature, they cannot exercise the right.

Snively v. Washington Town, 218 Pa. 249, 67 Atl. 465, 12 L. R. A. New Ser. 918, is an instructive case upon the right of the abutter.

In that case the public road was laid out through a farm, leaving a passageway under the road serving as a water course, passway for cattle and a private road. This was continued in use for fifty years, when the culvert was filled in by the township authorities.

The court held that the township was not liable in damages for closing up the passageway for cattle, and in the opinion it is said:

"Indeed, it may be stated as a general rule that the supervisors have the whole care and entire super-

vision of the public highways, and that no person, not even an abutting landowner, can make any permanent private use when it is deemed expedient or necessary in order to promote the public use of the highway."

(I) THE STATE HAVING CONTROL OF THE PUBLIC HIGHWAYS MAY GRANT PRIVILEGES TO ITS OWN CITIZENS AND REFUSE THEM TO OTHERS, INCLUDING FOREIGN CORPORATIONS.

McCready v. Va, 94 U. S. 391, and
Consumers Gas Co. vs. Harless, 131 Ind. 446, 29 N. E. 1062,

as well as all the cases we have heretofore cited to support the statement that eminent domain may be withheld from foreign corporations established this doctrine.

In McCready v. Va., is is said in the syllabus:

> "A state can grant to its own citizens the exclusive use of lands covered by water, for raising oysters, and may prohibit, under a penalty, their use for such purpose by citizens of other states."

In the Harless case the constitutionality of an act of the Legislature was under consideration which granted unto domestic corporations the right of eminent domain for the purpose of supplying gas to persons within the state.

It was contended that the failure to grant the right to companies supplying gas to persons without the state, rendered the act unconstitutional.

It is said in the opinion, on page 1064 of the reporter:

> "In this state, the Legislature in the exercise of its discretion, has judged it proper to clothe companies, corporations and associations engaged in the business of furnishing petroleum and natural gas to the citizens of this state, for consumption, with the power of eminent domain; while it has not as yet thought proper to clothe companies, corporations and associations not so engaged with the power. It is not in our province to inquire into the motives which prompted the Legislature to grant this power to persons engaged in furnishing petroleum and natural gas to the people of this state, and to make no such provision for those furnishing them to people of other states. It is sufficient for us to know that, under the authorities above cited, it possesses the power to do so, and that, in the exercise of the discretion, it possesses, it has done so."

THIRD.

THE ACT IS VALID AS AN EXERCISE OF THE STATE'S POLICE POWER IN CREATING AND CONTROLLING ITS OWN CORPORATIONS.

This act grants unto domestic corporations a right to use the highways for constructing pipe lines.

It provides that this business shall not be engaged in by individuals or by foreign corporations.

The validity of these provisions is established by the decision of this court in Noble State Bank v. Haskell, 31 Sup. Ct. Rep. 186.

This is true whether constructing pipe lines through the public highway was a common use or a franchise prior to the enactment of the law.

Banking has always been a common business open to individuals or corporations, but in the case cited, a statute restricting the business to corporations and conferring it upon them only on condition that they contribute to a fund out of which to pay the debts of other banks was sustained.

In the case at bar the act limits the pipe line business to domestic corporations and confers it upon them only on condition that they will not transport gas out of the state.

The Noble State Bank case forecloses further argument on this point and it is unnecessary to enlarge upon it.

The appellees, however, not being domestic corporations, are not granted any rights by the act under consideration, and therefore have no right to complain of the provisions of the law.

Lee v. State, 207 U. S. 67, 28 Sup. Ct. Rep. 22.
Dolly v. Abiline Nat. Bank, 179 Fed. 461.

FOURTH.

THE ACT DOES NOT REGULATE INTERSTATE COMMERCE, BUT ONLY AFFECTS IT INDIRECTLY, JUST AS IT MIGHT BE AFFECTED BY THE DENIAL OF THE RIGHT OF EMINENT DOMAIN TO FOREIGN CORPORATIONS OR THE REFUSAL TO GRANT A CITY FRANCHISE TO AN INTERSTATE PIPE LINE COMPANY OR AN INTERSTATE TELEPHONE COMPANY.

The act of the Legislature of Indiana, sustained by the Supreme Court of that State in Consumers Gas Co. v. Harless, 29 N. E. 1062, from which we have previously quoted, is directly in point.

There, the right of eminent domain was conferred upon domestic corporations engaged in piping gas to points within the state, and was not conferred upon those piping gas outside of the state.

Here, the right of eminent domain is conferred upon some domestic corporations, and is not conferred upon foreign corporations.

In addition to this, the right to use the highways is conferred upon such domestic corporations, but not upon foreign corporations.

In the Harless case, in discussing this point, it is said in the last paragraph of the opinion:

> "Under the fifth position assumed by the appellees it is contended that the law in question interferes with interstate commerce, in that it prohibits the piping of petroleum and natural gas out of the state. It may be that those who desire to pipe petroleum and gas out of the state are hindered in their operations by the absence of a statute conferring on them the power of eminent domain, but we are unable to perceive any interest they have in the question as to whether those piping petroleum and gas for domestic use do or do not possess such power. The former are in no worse condition than they were before the passage of the law under consideration. In other words, it affects them in no manner whatever. How, then, can it be said to interfere with interstate commerce?"

Northwest. Tel. Exchange Co. v. City of St. Charles, 154 Fed. 386, is directly in point.

In that case the telephone company was a Minnesota corporation, empowered by the act of 1881 to use the highways of the state for erecting poles and wires. In 1893 another act was passed providing that telephone companies could not use the streets of a city without obtaining a franchise therefor from the city. The telephone company desired to construct a line of poles and wires upon a street in the city of St. Charles, to use in connection with its business, extending outside of the State of Minnesota and into the States of North and South Dakota, Iowa and Wisconsin, but the city would not grant the authority. The company contended that this act of the Legislature, limiting the power which had been formerly granted to it, in connection with the refusal of the city of St. Charles to allow the use of its streets, was an interference with interstate commerce.

The case was tried before Judge Lochren who, on pages 389 and 390, says:

> "There is no doubt that the long distance telephone established by the complainant company, which runs through the city of St. Charles, extending from Winona to Mankato, and connecting with other states, is an instrument used in interstate commerce, and that the transmission of intelligence over a telephone or telegraph line is interstate commerce. That is well settled in the decisions. But I apprehend that this fact makes no difference in the present case. While any interference by the Legislature with an established instrument of interstate commerce might be a subject of criticism, still the fact that a line of telegraph or telephone will,

when completed and in use, be used for the purpose of interstate commerce, gives no right to the persons or corporations projecting the establishment of a concern of this kind to do so upon terms different from what others would be required to submit to in the establishment of a similar enterprise. I mean by that, that they would have no right of way, simply because the instrumentality would be used for interstate commerce, other than it would have if it was only suitable for any other public use. A railroad company, or a telegraph company, or a telephone company, would have to supply its own instruments, its railroad, its telegraph line, its telephone line, without any reference to what its use would be, in the ordinary manner. It would have to obtain its right of way, either by a grant or license from the state where it was upon the highways of the state, or by purchase or condemnation where it was upon private property. Therefore I do not see that the fact that this is an instrument of interstate commerce affects the decision of the case at all, or has any bearing upon it."

This reasoning is directly in point. The appellees confuse their right to engage in interstate commerce with their desire to use the property of the state.

An interstate railroad might just as well claim the right of eminent domain because it intended, by the exercise of that right, to secure a road bed over which to conduct interstate commerce. Yet the decisions we have referred to establish the right of the state to grant or withhold the right of eminent domain.

Wilson v. Hudson County Water Co. (N. J.) 76 Atl. 560, is also directly in point.

In that case the water company wanted to construct a pipe line across the Kill von Kull in lands under water belonging to the state.

The water was navigable and the company had secured a permit from the Secretary of War, and claimed that, under this permit, it had the right to enter upon the lands of the state for the purpose of engaging in interstate commerce. After considering at length the effect of the permit issued by the Secretary of War, the court reached the conclusion that it was operative only so far as the United States government was concerned, and was not designed to permit the water company to use a right of way over the lands of the state without lawfully acquiring the right to do so.

On page 566 of the Reporter it is said:

> "Congress may some day be induced to enact a law under the commerce clause of the federal Constitution, which will make a grant of power such as is contended for by the water company in this case, but up to the present time it has not done so, and the water company, without a grant of power, is seeking to prosecute an unlawful work—a work not unlawful in and of itself, but unlawful so far as it appropriates the land and invades the right of the state of New Jersey, and this by obtaining a mere license from supervisory power, a license to do the thing desired, efficacious only if and when lawful authority to prosecute the work shall have been obtained."

The difference between that case and this is that here

the appellees have no permit from the United States government, while there they had.

Here, without any permit, they seek in violation of law, to use the public highways of the state, while there, they sought to do so under a permit from the Secretary of War.

On page 567 of the Reporter, the court proceed:

> "The commerce clause of the Constitution of the United States is in abeyance so far forth as enacting any law authorizing the laying of pipe lines under the navigable waters of the United States in aid of interstate commerce is concerned, and, although some future Congress may pass such an act, until it does so the State of New Jersey may at least prevent the appropriation of any of its lands under the navigable waters of the United States by any person or corporation seeking to use such land in furtherance of its business, although that business may be interstate commerce."

The confusion of the right to engage in interstate commerce with the power to forcibly secure a right of way is the basis of appellees' case.

This same confusion of thought is pointed out by Mr. Justice White in his opinion in Ohio Oil Co. v. Ind., 177 U. S. 190, where he says, at page 202:

> "A confounding, by treating as identical, things which are essentially separate, that is, the right of the owner of land to bore into the bosom of the earth, and thereby seek to reduce the gas and oil to possession, and his ownership after the result of the borings has reached

> fruition to the extent of oil and gas by himself actually extracted and appropriated. In other words, the fallacy arising from considering that the means which the owner of lands has a right to use to obtain a result is in legal effect the same as the result which may be reached."

If the appellees had a right of way they might engage in interstate commerce, but their desire to engage in interstate commerce is a different thing from the means open to them to procure a right of way.

The statute under consideration simply withholds from them the right of way over the land of the state, and, not having the right of way, they cannot use it. The purpose for which they desire to use it does not give them the right to take it.

This principle is illustrated by the case of
Western Union Tel. Co. v. Pa. R. R. Co., 195 U. S. 540.

In that case the telegraph company sought to enjoin the railroad company from removing from its right of way the telegraph company's lines of poles and wires. The injunction was denied, although the effect of it was a direct interference with interstate commerce, but the learned counsel for the telegraph company did not even raise that point, nor did this court consider it in passing upon the controversy. Both the court and counsel in that case saw the palpable difference between the right to engage in interstate commerce and the privilege of occupying the railroad's right of way for the purpose.

It is, of course, too well settled to require citation of authority that an exclusive gas franchise may be granted in the streets of a city. Suppose such a condition,—suppose, further, that an interstate pipe line should bring gas to the city limits,—could it enter in defiance of the exclusive franchise and over the protest of the city, simply because it was undertaking to engage in interstate commerce Or, could a foreign railroad corporation exercise the right of eminent domain in defiance of the laws of a state, because it desired to procure a right-of-way for interstate commerce? As surely as these questions should be answered in the negative, so surely should this law be sustained.

We respectfully submit that the injunction should be dissolved and the causes dismissed.

CHARLES WEST,
Attorney General of Oklahoma,
For the Appellant.

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Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

No. 916

CHARLES WEST, Attorney-General of the State of Oklahoma,

vs.

THE KANSAS NATURAL GAS COMPANY, THE MARNET MINING COMPANY, and A. W. LEWIS.

Appeal from the Circuit Court of the United States for the Eastern District of Oklahoma.

BRIEF ON BEHALF OF DEFENDANTS IN ERROR.

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Purpose of the Brief.

The purpose of this brief is to prove:

First. The citizens of the United States, using a mere corporate form the more easily and readily to transact interstate commerce, do not thereby lose their rights as Federal citizens but may exercise them under such corporate form in interstate commerce.

Second. Such rights include the right to buy and sell and transport in and from any state of the Union natural gas to any other state of the Union, and to do the things and use the instruments and appliances reasonably necessary to accomplish such end.

Third. The Federal citizen desiring to purchase and transport natural gas from Oklahoma to other states may also purchase a private right of way from the owner thereof through private lands in Oklahoma, to lay, maintain and operate pipe lines for gas from the borders of Oklahoma to the place where the gas is for sale; and if such right of way is met by public highways, then the Federal citizen owning the right of way up to and on either side of said public highway may cross beneath the same, and lay thereunder and maintain and use his pipe line, provided that he does not thereby endanger the public safety.

Fourth. The state of Oklahoma cannot forbid the purchase, sale and transportation out of its territory of natural gas, and therefore the Act of 1907, which utterly forbids such transportation of gas outside of the State of Oklahoma, is void as a regulation of interstate commerce and a denial of the privilege of engaging in such commerce

possessed by citizens of the United States. And said Act is also void because it allows freely to citizens of the state of Oklahoma the right of maintaining pipes beneath and across the highways for the transportation of natural gas, and denies that right to other citizens of the United States where the purpose is to transport through such pipes the gas out of the State of Oklahoma, thus granting to one class transacting internal commerce a privilege denied to another class who engage in interstate commerce.

FIFTH. While it is not believed that the question of the conservation by Oklahoma of the entire gas within its borders for the use of the citizens of Oklahoma arises in this case, yet treating the question as in the case, it is submitted that the law of Oklahoma prohibiting the transportation of natural gas out of its borders is—

(a) A regulation of interstate commerce and therefore void;

(b) A denial of the right of citizens of the United States to purchase, transport and sell in other states such gas; and,

(c) A doctrine or right which, if sustained as to Oklahoma, must exist in all other states of the Union, the result of which would be numerous barriers to interstate commerce and the exclusive use by citizens of the different states of those products which, for any reason, such citizens might desire to keep for themselves, and thus involve interstate commerce in many of the difficulties and much of the confusion which existed under the Confederation, the abolishment of which was supposed to have been accomplished by the Union of the States.

SIXTH. This suit was properly brought against the defendants named.

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FACTS.

From the averments in the bills (filed January 2, 1909) confessed by all the defendants except the Attorney General, and denied in his answer only in part, as we shall show, and from the affirmative averments well pleaded in that answer, the facts necessary to an understanding of the questions in this case are gathered as follows:

Three (3) bills were filed in the United States Circuit Court for the Eastern District of Oklahoma, viz., by

the Kansas Natural Gas Company, a corporation of the State of Delaware engaged in interstate commerce, by the Marnet Mining Company, a corporation of the state of West Virginia engaged in interstate commerce, and by A. W. Lewis, a citizen of the state of Ohio, the owner of an oil and gas mining lease, the property covered by the same being in Washington County, Oklahoma. All these suits were consolidated and form but one proceeding.

(For stipulation, see Record, page 104.)

Each bill made as defendants Charles N. Haskell, Charles West, John J. Shea, John H. Kane and Frank B. Burford, citizens of the state of Oklahoma and residents of the county of Washington; J. E. Love, J. J. McAlister and A. P. Watson, citizens of the state of Oklahoma and residents of the counties of Woodward, Pittsburg and Pottawatomie respectively therein, and Pete Hanraty, a citizen of the state of Oklahoma and a resident of the county of Pittsburg, and they aver that Mr. Haskell is the Governor of Oklahoma, Mr. West, the Attorney-General, Mr. Shea, Deputy Attorney-General, Mr. Kane, County Attorney of Washington County, Oklahoma, Mr. Burford, deputy County Attorney of Washington County, Mr. Love, Mr. McAlister and Mr. Watson, Corporation Commissioners of the state of Oklahoma, and Mr. Hanraty, Mine Inspector of the state of Oklahoma.

Each bill alleged that each of the said defendants by virtue of his office and of the Constitution and laws of the state of Oklahoma, is clothed with some power and authority and charged with some duty in the execution and enforcement of the laws of that state, and particularly in the enforcement of the provisions of Chapter 67 of the Session Laws of that state

enacted in 1907-1908, and that such defendants have assumed and undertaken to execute and enforce said Act both by actions and proceedings in the courts of the state and by force of arms. That that Act (printed at length on page 52 of the Record) in effect denies the right of any one, citizen or corporation of Oklahoma or any other state, to transport out of the State of Oklahoma any natural gas whatever therein found; that these defendants proposed to enforce and were enforcing the provisions of that Act and preventing the plaintiffs from carrying or transporting gas outside of the state territory; and that the defendants caused the line dividing Oklahoma and Kansas to be patrolled with armed guards ordered to resist with force the laying of any gas pipe line across the same, and threatened to tear up and destroy any pipe line so laid.

That the Kansas Natural Gas Company is a corporation of Delaware and is actually engaged in interstate commerce in the acquisition, transportation and sale of natural gas between some of the different states of the Union, namely, Kansas, Missouri and Oklahoma; that natural gas had been discovered in large quantities in the county of Washington and elsewhere in the state of Oklahoma; that many gas wells had been drilled and equipped for the development of the said gas fields, until the gas fields of Oklahoma then had about 500 gas wells producing and furnishing over 1,500,000,000 cubic feet of gas per day of twenty-four hours, and that of this quantity not more than 50,000,000 feet of gas per day were being used by the citizens of Oklahoma; that gas is a desirable fuel, and the method of transportation of the same, which has been conducted and carried on for many years last past, is by pipe lines, and that there is no other practicable method of so transporting the gas; that gas may be transported by pipe lines wholly without hurt, hindrance, damage or inconvenience to the traveling public

or the abutting property owners along the public highways by means of pipes on, over, along and under the said highways of the state, and that about 500 miles of natural gas pipe used by its citizens for the internal commerce of Oklahoma are so laid, longitudinally along, across and under the highways of the state, through which natural gas is transported.

That the Kansas Natural Gas Company has a contract with the Jefferson Oil Company for the purchase of all the gas that can be produced from a certain well situated in Washington County, Oklahoma, and by purchase has acquired the right of way over and across the land upon which said well is situated for the laying of pipe lines for the transportation of gas.

That the plaintiff, Lewis, was and is the owner of gas territory and of a gas lease in Washington County, Oklahoma, and he is desirous of selling his natural gas to be used in interstate traffic. The Kansas Natural Gas Company desires to buy and transport that gas into the states of Kansas and Missouri, and there to distribute and sell the same; that the Kansas Natural Gas Company proposes to construct a pipe line from its present southern terminus in Montgomery County, Kansas, to and through the line dividing the states of Kansas and Oklahoma, and through Oklahoma to a point in Washington County, Oklahoma, where the gas well owned by the Jefferson Oil Company and which was transferred to one E. P. Whitcomb, and subsequently by Whitcomb transferred to the Kansas Natural Gas Company, is located, and to take and transport that gas into Kansas and Missouri, as also the gas of Mr. Lewis.

That the proposed construction of this pipe line will not be longitudinally along any public highway in the state

of Oklahoma (although the plaintiffs claim the right to so construct), but is to be laid through and by means of private rights of way owned by the Kansas Natural Gas Company; but wherever its right of way is crossed by any of the highways of the state, the Kansas Natural Gas Company and the Marnet Mining Company propose, as owners of the property or of the right of way abutting on both sides of the said public highway, to tunnel under said highway for the purpose of laying the gas pipes thereunder, and that the said line is not to be laid so as in any way to interfere with or endanger or incommode the public travel, but in the same identical manner as natural gas lines are now laid, maintained and operated over the public highways of Oklahoma for the distance, at least, of 500 miles; and when the line is laid under the public highway, it will be laid at such a depth and in such manner as not to interfere with or endanger or impede the use of the highway as such.

That the Marnet Mining Company alleged that the Kansas Natural Gas Company was in the market for gas and was willing to buy and transport such gas to Kansas and Missouri, and that the Marnet Company proposes to build and construct a gas pipe line from the state of Kansas across the line dividing the states of Kansas and Oklahoma and into the state of Oklahoma over the east half of the Northeast quarter of Section 16, Township 29, Range 13 in Washington County, Oklahoma, through and over a right of way secured from one Inge, who is the owner of the said tract of land and who granted to one Frank V. Eaton the right of way over said property for the purpose of laying, building and maintaining a gas pipe line, and which right the said Eaton transferred to the Marnet Company.

That it was not intended in the construction of said gas line which was to be projected into Washington County,

Oklahoma, where the producing gas wells were, to lay the same longitudinally along any public highways of the state of Oklahoma (although the Marnet Company claimed the right as engaged in interstate commerce so to do); but the Marnet Company proposed to lay its line along said right of way and not touch the highways of the state except where the highway crossed the right, and there, being the owners and having the right of way up to and adjacent to the highway on either side, to tunnel under said highway and lay its gas line in such manner as not to impede, hinder or delay public travel, or endanger the same; that the gas line so proposed to be laid would be done so as not, in any way, to endanger public travel or transportation over the highways, and as safely and securely as the gas pipe lines already on the public highways of Oklahoma were laid and used.

A. W. Lewis, a citizen of the state of Ohio, alleged in his bill that he is the owner of an oil and gas mining lease dated May 2, 1905, for a term of fifteen (15) years, the leasehold in which is situated in Washington County, Oklahoma, containing eighty (80) acres of gas bearing territory, and that he has, at great expense, drilled one large gas well capable of producing many million cubic feet of gas per day, and that he has been forced to shut in and cap the said well, and he is unable to sell, market or dispose of the gas therefrom because of the great over-production of gas in Washington County, Oklahoma, and because the State of Oklahoma will not allow the exportation of the same.

He also joins in the averments heretofore recited of the existence of 500 miles of gas pipe lines along the highways of Oklahoma, and then avers that the legislature of Oklahoma, in 1907-1908, passed an Act of Assembly, the purpose of which was to prevent the transportation of natural gas beyond the borders of the state. This Act (Chapter 67) will be found in the Record, p. 52.

All the bills alleged that Lewis was ready and willing to sell and deliver his gas to the Marnet Company and the Kansas Natural Gas Company, and each of these companies averred their willingness and intention to build their said pipe lines up to the wells that Lewis owned, and over and across the private rights of way which these companies had secured, and to tunnel under the highways only where those highways crossed the right of way and where such tunnelling was necessary in order to reach the said gas wells. That all the defendants protested and threatened and intended to prevent the construction of said pipe lines and to enforce the said provisions of Chapter 67 of the legislature of Oklahoma, and used and threatened to use force and violence to prevent the plaintiffs from laying pipe lines. The bills each prayed that the said defendants would be enjoined from so doing, or, from in any way, preventing the laying of said gas pipes and the transportation of gas through the same from the Washington field in Oklahoma through Oklahoma and into Kansas and Missouri.

ANSWER OF THE ATTORNEY-GENERAL.

The answers filed by all the defendants, except the Attorney General, were withdrawn by them, and as to them the allegations of the bill were taken as confessed.

The Attorney General in his answer admits that there are in the State of Oklahoma 273 commercial gas wells having a potential volume of 1,225,000,000 cubic feet per day, but he denies that the—

> "* * * said wells last named are capable of furnishing the amount last named from day to day for anything but a very short period as hereinafter more fully stated." (Rec. 106).

He admits that certain gas wells have been capped and shut in; avers that the total daily consumption of gas in Oklahoma is approximately 215,000,000 cubic feet per day,—

"* * * which amount would be greatly and continually increased except for the fact that the production is not sufficient to supply the demand." (Rec. 107).

He avers that—

"* * * the legitimate demands for gas in said State exceed the production therein." (Rec 107).

He further avers that—

"* * * while the present daily capacity of the gas wells of the State is approximately one and a quarter billion feet per day, that the present daily consumption is more than can be safely taken from said wells without rapidly destroying their efficiency and depleting this great natural resource of the State." (Rec. 107).

He states his belief that if the complainant is allowed to pump gas out of the state that the field will be exhausted in a short time.

He alleges:—

"I am further informed and believe and upon said information state the fact to be, that while the natural gas of the State of Oklahoma is found in a gas and oil producing sand, extending underneath large contiguous areas of land and that every well reaching into said gas sand takes from this unbroken area and thereby diminishes the producing capacity of any other well and of the entire field and that if the complainant is allowed to transport gas from such fields through the new pipe lines constructed over and across the highways of the State, that it will thereby greatly damage and injure the

entire field which it reaches and injuriously affect and take the property of all other owners of gas in said field, and that the act of the Legislature of the State of Oklahoma alleged by the bill to be unconstitutional, was an effort on the part of the Legislature of the State to preserve the natural gas field of the State from distributive waste." (Rec. 108).

He further states:—

"That because of its generally prairie character said State is entirely without a domestic fuel except coal and natural gas and that its supply of coal is growing rapidly more costly to produce because of the peculiar nature of the Oklahoma mines—their great depth, bad floors and ceilings, bad inclines, great dryness and presence of noxious and dangerous gases: that the petroleum oil produced in the State is practically all of it transported outside the State before being refined, and that substantially the only natural practical usable fuel both for domestic and industrial use is natural gas." (Rec. 109).

He then avers:—

(a) That Enid, El Reno, Lawton and other places are anxious to obtain and use natural gas but are without the same.

(b) That if the kind of pipe line proposed by the plaintiff is constructed—

"no further development of the natural gas business in the State so far as the supply of cities not now obtaining the same, will in reason be accomplished, and because of the relative smallness of the present lines to Oklahoma City, Guthrie and Shawnee compared to plaintiff's proposed lines,

will in the immediate future leave said cities without natural gas." (Rec. 109).

(c) The bad effect of pumps.

Highways.

On page 109 he avers as follows:—

"That the use of the highways is a portion of the public property and the same should be confined to those who supply all alike who may seek to be served, that because of its nature and extent, and because the enormous amount of capital needed to make practical investments tends to create monopolies, the business of gas transportation is a public business in interstate trade, over which Congress has never legislated, and interstate trade, and that to permit plaintiff to carry out its said attempt and intent to monopolize the natural gas of the State and transport it away without regulation by the State laws over and across the State's highways, without the State's consent would be to devote public property to private and exclusive use against the principles of the Constitution of this State and the United States, and deprive the intending purchasers of natural gas in this State from all supply whatsoever."

Pipe Lines.

On page 111 he admits that the transportation of natural gas—

"* * * has grown into a great industry and admits that millions of dollars are invested therein; and he admits that the transportation by pipe lines is the only method of transportation now usually availed of, but this fact is due to the cheapness of transportation by

such means as compared to any other kind of transportation and the competition is thus restricted at this time to transportation of natural gas by pipe lines in that transportation by any other means at the present rate of transportation would not in most instances place the commodity in the market at a price sufficiently low to mean competition with coal, oil and other fuel products, and that the restriction to pipe line is therefore caused by the cheap price at which oil and coal is now upon the market, as well as the cheapness with which natural gas may be transported from other places to any market, and this respondent respectfully avers that the highways of Oklahoma are open to the transportation of natural gas by any means or method which does not make a permanent appropriation of any part of the highways by placing a plant in the same and that nothing in the laws of Oklahoma, nor the acts of this respondent nor purposed by him in any way interferes or hinders the transportation of natural gas by any proper highway use without placing a plant in the same."

On the same page, section 14, he admits that there are natural gas lines in daily use for the transportation of gas within the state, and that they are often of great length, and run over and across the public highways of the State;—

"* * * that the same are operated without hurt, hindrance, damage or inconvenience to the traveling public or to abutting property owners."

On page 112 he avers that—

"* * * and further this defendant denies that it is his purpose and intent, either avowed or otherwise, to prevent the transportation of natural gas in Oklahoma beyond the limits of the State; but he avers that

he intends acting under his duty as Attorney General to prevent solely by actions in competent courts, the laying or constructing or operation of gas pipe lines, in, on, under, across or along the highways of the State by the complainant or any other person not authorized so to do by the laws of Oklahoma."

He avers (p. 114) that—

"* * * he has a right to and a duty to bring such actions as the valid laws of the State require."

HEARING IN THE COURT BELOW.

The case was argued before Judges Pollock and Campbell, and an opinion rendered sustaining the right of the plaintiffs to a preliminary injunction on July 3, 1909 (172 Fed., 545). Subsequently the cases were consolidated, and (Record, page 133) on February 11, 1911, a final decree was entered declaring Section 67 unconstitutional, and enjoining the defendants from attempting to enforce the same; and from this decree so entered an appeal was taken to this court.

When a case is heard upon bill and answer, allegations in the bill which are not denied in the answer are taken as admitted.

In *In re Sanford Fork & Tool Co.*, 160 U. S., 247, 257. Mr. Justice Gray said:

"A demurrer to the answer is unknown in equity practice. But the plaintiff may set down the case for hearing upon bill and answer; whereupon *all the facts alleged in the bill and not denied in the answer,* as well

as all new facts alleged in the answer, are deemed admitted, as upon a demurrer to an answer in an action at law. Equity Rule 41, as amended at December Term, 1871, 13 Wall. xi; Equity Rule 60; *Leeds vs. Marine Ins. Co.*, 2 Wheat. 380; *Reynolds vs. Crawfordsville Bank*, 112 U. S. 405, 409; *Banks vs. Manchester*, 128 U. S. 244, 250, 251."

To the same effect are:

United States vs. Flournoy Live-stock & Real Estate Co., 71 Fed., 576;
Klenk vs. Byrne, 143 Fed., 1008, 1010;
Besson & Co. vs. Goodman, 147 Fed., 887.

ANALYSIS OF CHAPTER 67... (Rec., p. 52.)

(Approved December 21, 1907.)

"CHAPTER 67.

Pipe Lines.

Regulating Gas and Oil Pipe Lines."

Article I.

"An Act regulating the laying, constructing, and maintaining and operating of gas pipe lines for the transportation of natural gas *within the state of Oklahoma,* defining the modes of procedure for the exercise of the right of eminent domain for such purposes. Providing for the inspection and supervision of the laying of such pipe lines and limiting the gas pressure therein, and providing penalties for the violation thereof."

Section 1.

"Any firm, co-partnership, association or combination of individuals may become a body corporate under the laws of this state for the purpose of producing, transmitting, or transporting natural gas to points within this state by complying with the general corporation laws of the state of Oklahoma, and with this Act."

Section 2.

"No corporation organized for the purpose of, or engaged in the transportation or transmission of natural gas within this state shall be granted a charter or right of eminent domain, or right to use the highways of this state unless it shall be expressly stipulated in such charter that it shall only transport or transmit natural gas through its pipe lines to points within this state; that it shall not connect with, transport to, or deliver natural gas to individuals, associations, co-partnerships, companies, or corporations engaged in transporting or furnishing natural gas to points, places or persons outside of this state."

Section 3.

"Foreign corporations formed for the purpose of, or engaged in the business of transporting or transmitting natural gas by means of pipe lines, shall never be licensed or permitted to conduct such business within this state."

Section 4.

"No association, combination, co-partnership or corporation shall have or exercise the right of eminent domain within this state for the purpose of constructing, or maintaining a gas pipe line or lines within this state, or shall be permitted to take private or public property for their use within this state, unless expressly granted such power in accordance with this Act."

Section 5.

Provides that the laying, constructing, building and maintaining of pipe lines for the transportation of natural gas,—

> "* * * along, over, under, across or through the highways, roads, bridges, streets or alleys in this state, or of any county, city, municipal corporation, or any other public or private premises within this state is hereby declared an additional burden upon said highway, bridge, road, street or alley, and any other private, or public premises *may only be done when the right is granted by express charter from the state* and shall not be constructed, maintained or operated until all damages to adjacent owners are ascertained and paid as provided by law."

Section 6.

Pipe lines shall be laid under the direction and inspection of the mining inspector.

Section 7.

Provides that the pressure in the pipe lines shall not exceed 300 pounds to the square inch, except for purposes of testing.

Section 8.

> "Any corporation granted the right under the provisions of this Act to exercise the right of eminent domain, or use the highways of this state to construct or maintain a gas pipe line or lines for the transportation or transmission of natural gas to points within this state, which shall transport or transmit any natural gas

to a point outside of, or beyond this state, or shall connect with or attempt to connect with or threaten to connect with any gas pipe line furnishing, transporting, or transmitting gas to a point outside of, or beyond this state, shall by each or all of said acts, forfeit all right granted it or them by the charter from this state, and said forefeiture shall extend back to the time of the commission of said act or said acts in violation of this Act; and such act or acts shall of themselves work a forfeiture of any and all rights of any and every kind and character which may be or may have been granted by the state for the transportation or transmission of natural gas within this state, and all the property of said corporation, and all the property at any time belonging to said corporation, at any time used in the construction, maintaining or operation of said gas pipe line or lines shall, in due course of law, be forfeited to and be taken into the possession of the state through its proper officer and in said action there shall be a right to the state of the appointment of a receiver, either before or after the judgment, to be exercised at the option of the state, and the officer taking possession of said property shall immediately disconnect said pipe line or lines at a proper point in this state from any pipe line or lines going out of, or beyond the state. And said property shall be sold as directed by the court having jurisdiction of said proceedings, and the proceeds of said sale shall be applied, first to the payment of the cost of such proceeding, and the remainder, if any, paid into the school fund of the state, and said charter under which said act or acts were committed shall be revoked, and no charter for the transportation or transmission of natural gas shall ever be granted to any corporation having among its stockholders any person who was one of the stockholders of said corporation whose charter

has or may have been forfeited as aforesaid, and if any such charter shall have been granted, and thereafter a person shall become a stockholder thereof who was one of the stockholders of the corporation whose charter has been or may have been forfeited as herein provided, the charter of said corporation, one of whose stockholders is as last named, shall therefore be forfeited and revoked. Provided, that any person who may be denied the right to become a stockholder as above prescribed may be granted the right to become such stockholder by the corporation commission, when such person shows to such commission that he was not a party to the former violation of this Act."

Section 9.

When the purpose of the company is to transport gas for sale to the public, it shall not furnish the same until it has procured the certificate of an inspector,—

"* * * provided that nothing in this Act shall be construed to prevent persons drilling for oil and gas from laying surface lines to transport or transmit gas to wells which are being drilled within this state and further provided, that factories in this state may transport or transmit gas through pipe lines for their own use for factories located wholly within this state, upon securing the right of way from the state over or along the highways and from property owners to their lands."

Section 10.

Provides that no person, firm, association or corporation shall operate a pipe line within the state of Oklahoma for the transportation of natural gas except such persons or bodies be incorporated, and the right of incorporation is allowed.

ARGUMENT.

RIGHTS OF FEDERAL CITIZENS ENGAGED IN INTERSTATE COMMERCE.

(The authorities supporting the following propositions are found under appropriate heads further on in this brief.)

In 1907 there were two men, one a citizen of Delaware and one of Oklahoma, who desired to trade with each other. Each was a citizen of the United States. The Delaware citizen desired to buy, and the Oklahoma citizen was willing to sell, and the object of the barter was natural gas. As citizens of the United States the Delaware man was lawfully entitled to buy and the Oklahoma citizen had the right to sell. Gas was a lawful object of commerce, and each man as a citizen of the United States was lawfully entitled to engage in interstate commerce, and to buy and sell and transport such object of commerce between the states. These were rights each held as a federal citizen. Marshall, Chief Justice, said that their rights to do so preceded the constitution and are recognized by it. (*Gibbons vs. Ogden*, 9 Wheat. 1, 211).

As then:

(a) Each was a citizen of the United States;

(b) Each was, as such citizen, entitled to engage in interstate trade and to enter each state in the Union and there barter with any other United

States citizen there residing, and transport out of the State the object purchased;

(c) Each might under the Federal laws respectively so buy and sell in Oklahoma or any other state, and where or how the object of the purchase and sale was obtained or mined or produced by the seller or others was immaterial. The Oklahoma federal citizen could sell expressly for the interstate trade, and the Delaware federal citizen could buy and put into interstate trade, and all this under federal laws, and their respective rights neither the state of Delaware nor Oklahoma could lessen, or in any way abridge;

(*Authorities infra*, pp. 47, 50, 187.)

(d) Neither state could make laws to regulate interstate commerce, or to determine how or in what manner the object of sale should go into interstate commerce, or what objects of sale should so go. All objects under federal laws could lawfully go, though Congress might prevent one or more objects from entering into such trade. But until Congress interfered, all lawful objects of commerce, i. e., all things one man wanted to sell and another man wanted to buy, might be bought by one United States citizen from another and put into interstate trade;

(*Authorities infra*, pp. 56, 63.)

(e) In one respect at least, all the territory of all the states of the Union is one, and state lines are unimportant; and that is where the fundamental rights of a citizen of the United States are con-

cerned. In his travels, his relations to interstate trade, he need not regard state lines. He stands, as it were, on Federal soil wherever he is. No part of any state can be barred off, and he be forbidden to enter it; and if the man who wants to sell lives in the center of Oklahoma, the Delaware man who wants to buy may go to him and Oklahoma cannot forbid;

(*Authorities infra* p. 77.)

(f) What the mode of transportation shall be in interstate commerce and what the instruments and facilities used in it, are for Federal, not State, control. All means that are appropriate and suitable to the end desired, i. e., transportation, may be used. Especially the state could not limit the method of the transportation to such instrumentalities as are unfit and insufficient to accomplish the end designed. For example, it could not forbid the transportation of gas except by buckets or wagons wholly unsuited and impracticable for the purpose;

(g) But as the citizen of Delaware and of Oklahoma has a dual nature, or, as it were, two distinct personalities, one as the federal citizen and the other as the citizen of the state, and as the state and the Federal Government both have power, in some way or other, and to some extent over some of the same things, the Oklahoma and the Delaware man are also subject to state laws, and the scope of the federal and the state sovereignty has to be defined.

Broadly, that definition is that as to federal rights, only federal laws control; as to state rights, only state.

(h) While each state has the police power and under it may enact a very wide field of legislation and while the power of the state is that of a sovereign and includes all properties within its borders, and it may subject them to its own constitution and regulate and control them as it sees fit, yet it cannot, by any law it enacts, violate the fundamental rights of citizens of the United States, or legislate at all about matters it has wholly committed to the federal government.

(*Authorities infra* p. 73.)

It therefore follows:

(1) The State cannot abridge by its legislation the rights of a citizen of the United States to enter any one of the states and there bargain with another United States citizen for and carry out of the state in interstate trade an article of commerce located within the state.

(2) It cannot in any way regulate interstate commerce, for over such commerce Congress has exclusive control, and such commerce includes—

(a) The article to be traded in;
(b) Its transportation out of the state;
(c) Access from the proposed buyer outside of the state, to the possible seller inside the state, no matter in what part of the state the seller and the article of commerce may be.

(3) The state may, as to mere local matters, as bridges, wharves, health laws, etc.,

which do not require one national rule for the government of all, enact legislation which may indirectly and remotely touch interstate commerce.

But it cannot legislate to any extent as to matters of interstate commerce which require one national uniform rule.

(4) The objects of interstate commerce, i. e., the things which may or may not enter into it, are solely for Congress, because one national rule is required for the same. The state cannot forbid the sale of such articles by a citizen of Oklahoma to a citizen of Delaware; or restrict the quantity sold; or deny to the purchaser the right to take the article bought out of the state; or prescribe its mode of transportation in such way as to practically prohibit its entry into interstate commerce.

The citizen of Oklahoma and the one of Delaware may, under the federal law, lawfully do as follows:

The Oklahoma citizen may, for interstate traffic and transportation, sell and deliver the gas he there owns and possesses;

The Delaware citizen may buy that gas and transport it out of Oklahoma into Kansas;

No state law of Oklahoma may forbid its purchase or sale or transportation by the Delaware man as a federal citizen.

THE OKLAHOMA ACT OF 1907 IS UNCONSTITUTIONAL.

Therefore, Oklahoma, when by the Act of 1907 it provided that no one could construct a gas line or lay pipes in Oklahoma for the transportation of gas out of the state of Oklahoma into Kansas, prohibited interstate trade in gas, and the statute is therefore void.

It is a law which does not seek to *regulate transportation* of the gas *out of* the state, but forbids it; and therefore it is in flat contradiction to the federal power in three respects:

(a) It is legislation forbidding interstate commerce in gas, the entire jurisdiction over which the state had already granted to Congress, and about which the state could not legislate;

(b) It expressly forbade the federal right of each citizen of the United States, if he owned the gas, to sell it for the express purpose of transportation, and of every other citizen of the United States to buy it and put it into interstate commerce;

(c) It, in a limited and yet a legal sense, took the property of the Oklahoma man for public use without compensation, in that it forbade him to sell except for use within the state of Oklahoma, and thus limited his market and reduced the value of his property.

CONSERVATION OF NATURAL RESOURCES IS NOT A QUESTION IN THIS CASE.

The question of the conservation by Oklahoma of the natural gas; the prevention of its speedy exhaustion; the averred propriety of its being kept by Oklahoma exclusively for a present and future fuel supply for citizens of Oklahoma, does not properly and legitimately arise in this case.

The Constitution of Oklahoma requires that every act of the legislature shall indicate in its title its purpose and contents. If it does not do so, it is unconstitutional.

> Section 57 of the Oklahoma Constitution provides:
> "* * * every act of the legislature shall embrace but one subject, which shall be clearly expressed in its title."

Neither the title nor the body of the act has one word about the conservation of natural gas for a fuel supply for Oklahoma.

That such was the purpose of this act or the intention of it, or that the legislature so intended, there is no evidence whatever.

The title of the Act (Chapter 67 of the Laws of 1907-1908) is:—

PIPE LINES.

Regulating Gas and Oil Pipe Lines.

ARTICLE I.

The purposes of the Act are stated with precision in Article I., and they are as follows:—

(a) Regulating the laying, constructing, maintaining and operating of gas pipe lines for the transportation of natural gas *within the state of Oklahoma;*

(b) Defining the modes of procedure for the exercise of the right of eminent domain for such purposes;

(c) Providing for the inspection and supervision of the laying of such pipe lines;

(d) Limiting the gas pressure therein;

(e) Providing penalties for the violation thereof.

This Act of Oklahoma, regulating the laying, construction, maintenance and operation of gas pipe lines—

(a) Forbids the transportation of natural gas except by companies incorporated by Oklahoma;

(b) Restricts such gas lines as are laid to the transmission of natural gas to and from points within the state of Oklahoma and forbids transportation of it outside the state;

(c) The inspection and supervision both of the laying of the pipes and the transportation of the gas refer wholly and only to internal commerce;

(d) The granting of a charter is on the condition that the transportation shall only be to points within the state.

The Act of Oklahoma is not one to conserve and protect the waste of natural gas. There is not a line in it which does so. Its main intent and purpose is to prevent the transportation of gas out of Oklahoma. There are some incidental details (introduced, doubtless, to give color), requiring one piping gas in Oklahoma not to have a pressure of more than 300 pounds on the pipes; that pumps shall not be used on gas pipes, etc., and that they shall be laid under the supervision of some inspector. But there is nothing as to the mode of producing or use of natural gas, or the prevention of its waste inside the state.

There is no clause (as in the Indiana statute) for capping the well to prevent the escape of gas, or the burning of unnecessary lights in the gas district or other modes of conserving the supply. There are no provisions as to how the gas shall be used as fuel in home or factory to prevent its waste. Nothing is said as to the method of drilling for it or conducting it to the surface.

The Act itself is prepared with great subtlety. It is in Section X., (almost the last in the Act) that the direct provision is contained:—

> "That no person, firm, or association or corporation shall ever be permitted to transmit or transport natural gas by pipe lines in this state or in this state construct or operate a pipe line for the transmission of natural gas, except such persons, firms, associations or corporations, be incorporated as in this Act provided."

Section 1 of the Act authorizes—

> "Any firm, co-partnership, association or combination of individuals, may become a body corporate under the laws of the State for the purpose of producing,

transmitting or transporting natural gas to points within this State."

Section 2:—Such a charter, however, cannot be procured unless—

> * * * it shall be expressly stipulated in such charter that it shall only transport or transmit natural gas through its pipe lines to points within this State; *that it shall not connect with, transport to, or deliver natural gas to individuals, associations, co-partnerships, companies or corporations engaged in transporting or furnishing natural gas to points, places or persons outside of this State."*

Section 5 provides that the laying, constructing, building and maintaining a gas pipe line or lines for the transmission of natural gas—

> "may only be done when the right is granted by express charter from the State."

Section 8 provides that any company organized under the Act to transmit gas—

> "* * * which shall transport or transmit any natural gas to a point *outside* of or *beyond this State,* or shall *connect* with or *attempt* to connect with, or *threaten* to connect with any gas pipe line furnishing, transporting or transmitting gas to a point outside of or beyond this State shall, by each or all of said acts, forfeit all rights granted it or them by the charter of this State."

The forfeiture is instantaneous; is of the time of the commission of the acts; and the act authorizes the appointment of a receiver who is to seize the property of the gas

company and sell the same, and the person who buys the pipe line—

> "* * * shall *immediately disconnect* said pipe line or lines at a proper point in this State, from any pipe line or lines *going out of or beyond the State.*"

So far as this Act is concerned, the waste and loss of natural gas are not prevented and were not intended so to be, and the mere assertion now that such was the purpose of the Act cannot add to or change the Act which the State itself passed.

GOVERNOR HASKELL'S DECLARATION.

That the real purpose of this statute was not to conserve the natural resources of the State is shown by the following language from the first message of Governor Haskell, one of the defendants, to the Oklahoma Legislature on January 5, 1909:—

> "The policy of our government from the beginning has been to retain our natural gas for consumption within the State. Three distinct efforts during the year have been made to create an interstate pipe line to convey the Oklahoma gas to outside points in other states. We have successfully defeated these several efforts, and with the case now pending brought by the County Attorney of Osage county, at whose request the State is rendering assistance, and in which case the Indian Territory Illuminating Oil Company, a New Jersey corporation, which had planned to pipe gas from Oklahoma to St. Louis and other points, is the defendant, we firmly believe that this case will settle the question and for years to come will end the agitated question of transporting Oklahoma gas to distant points. As a result of that question being settled—that Oklahoma gas cannot be taken to foreign factories, we be-

lieve that the factories will come to the gas fields. We confidently anticipate as a result of this cheap fuel being reserved for home consumption that millions of dollars of taxable and profit-producing industries will be added to the wealth of Oklahoma."

This official message of the Governor shows no attempt at conservation, but an attempt to exploit their resources of natural gas even to the point of exhaustion as an inducement to secure and promote the growth of manufactures within the State.

Right of the State to Prevent Waste.

We do not deny the right of the state to pass such laws for the conservation of gas and oil and coal as are needful to prevent their waste and protect them for use as fuel, and as ruled by this court in the case of *Ohio Oil Company vs. Indiana,* 177 U. S., 190.

We have no controversy whatever with any decided case, nor are we here concerned with the definition of or the extent of the police power, and a lengthy discussion of such cases and doctrines can only confuse, not enlighten.

Our case merely asserts—

(a) Our clear rights as American citizens to enter into Oklahoma;

(b) Our right to engage in interstate trade by buying from the owner in Oklahoma an article of commerce for the purpose of its transportation into Kansas;

(c) That natural gas is an article of interstate commerce, and our purpose is to buy such gas from its

owner and, by appropriate means to transport that gas out of Oklahoma into Kansas;

(d) That such transportation can only be accomplished by and through pipe lines, and as the gas is useless at the well's mouth, its value depends on its transportation. We have the right to so transport through Oklahoma and into Kansas.

RIGHT OF OKLAHOMA TO CONSERVE NATURAL GAS.

We are not unwilling if this Court deems it proper for consideration to discuss this question of conservation.

Suppose that Oklahoma did pass an act reciting the averments in the Answer of the Attorney-General that fuel was a necessity for its present and future use and prosperity; that its coal was expensive to mine, *not denying, however, that it had plenty* of it; that its *crude oil* was a fuel it *allowed to be transported out of the state;* that it had no sufficient forests to give it wood for fuel, and that it desired, for the public welfare of the state of Oklahoma to keep exclusively for the state all the natural gas, allowing it exclusively to be used inside the state, and for the cities and towns and inhabitants of the state of Oklahoma, and that no portion of it should be transported into any of the adjoining states.

Would such an act be constitutional?

(a) It would at once build a wall around Oklahoma, so far as its gas is concerned, and the rights of the individual citizen of the United States who might own parts of the gas and the rights of the individual citizen of the United States who desired to buy the same, would be in large part denied and its value destroyed, and would be altogether denied and destroyed if the purpose of the seller and buyer was to introduce the gas into interstate trade. That, this act would forbid.

It would, therefore, as we have heretofore seen, be distinctly and directly a regulation of interstate trade.

(b) It would destroy one of the very purposes of the Union and the Constitution, and of the change from the Confederacy to the Union, because it would enable each state in the Union in a large degree, if not altogether, to determine what articles produced or manufactured in the state could be bought and sold and transported in interstate commerce. If Oklahoma can take gas out of the articles of commerce, Pennsylvania could take coal; California and Nevada could take gold and silver; Iowa and Minnesota could take their wheat crops; Wisconsin and Minnesota could take their iron ore; Michigan and other states could take copper ore; other states their oil; other states, timber—until practically all the articles produced from the soil in the whole of the United States could be barred out of interstate commerce by state laws, and thereby the interstate commerce not only regulated but greatly diminished, if not practically destroyed.

If the products of the soil can be so treated, why not all the products of its agricultural and manufacturing industries,—till each state practically refuses to trade with any other?

(c) It is useless to attempt to define future exigencies and future necessities and future possibilities. One may imagine circumstances which would seem to require that the state should seize, for example, all the wheat within its borders, or all the grain or all the cattle, and use them indiscriminately for the public good. Such a question does not arise here, and the peculiar circumstances of any such case would, in a large measure, govern and determine its decision. If there was an earthquake or a volcano developed in some particular region, the state authorities might do things and take steps, almost allied to the power of the nation in case of war; but even in all such possible future contingencies, it is submitted that the right to private property would always be protected, and the public would be amply protected, because the state, under its power of eminent domain, could condemn all the wheat and the cattle and the food necessary to meet the emergency. Such cases would not be the prohibition of owners of private property from entering into interstate commerce, but would merely be an exercise of the extraordinary power of eminent domain to take that which was necessary for the public welfare, but to compensate the owner for what was taken.

(d) Such a law, if legal in Oklahoma, would, as we have said, be legal in every other state of the Union, and each state would define for itself which of its products should go into interstate commerce, and thus not only regulate interstate commerce but destroy it; it would forbid and deny to the citizen of the United States his right as a federal citizen to introduce the natural gas into interstate commerce, and to buy and sell natural gas as an article of commerce.

It is not justified by any case we know. Nor has the indefatigable industry of opposing counsel discovered one.

The discussion of all the cases bearing on this question of conservation is to be found *infra* pp. 156, 177, 189.

IN TRANSPORTING OUR OWN NATURAL GAS OVER OUR OWN PRIVATE RIGHT OF WAY THROUGH AND OUT OF OKLAHOMA, WE ARE NOT EXERCISING ANY PUBLIC FRANCHISE OF THE STATE OF OKLAHOMA AND DO NOT REQUIRE ANY SUCH FRANCHISE.

The farmer in Oklahoma who carries his grain or his cattle or other products over his own private right of way into Kansas or Missouri or any adjoining state, and there offers them for sale, needs no franchise from the state to enable him so to transport; and so the Kansas Natural Gas Company and the Marnet Mining Company, purchasing and thus owning natural gas and transporting the same through their own privately owned pipes, laid on their own private right of way from Oklahoma into Kansas, do not need any franchise from the State of Oklahoma. They are not public carriers. They are not transacting a public business. They are carrying their own gas—their own private property—over their own private right of way out of Oklahoma into Kansas. They are not within the definition of a franchise or the exercise of a public right as defined by this court in—

California vs. Pacific Railroad Company, 127 U. S. 1, 40:

> "* * * a franchise is a right, privilege or power of *public concern*, which ought not to be exercised by

private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security."

The carrying by the Kansas Natural Gas Company of gas owned by itself out of Oklahoma into Kansas is the carrying on of interstate commerce, and for such carrying on the Kansas Natural Gas Company does not need the aid of any franchise from the State of Oklahoma. It has that right under the Federal Constitution:

Crutcher vs. Kentucky, 141 U. S., 47, 57, *infra*, p. 47.

The authorities on this question will be found on page 149.

METHOD OF LAYING PIPE LINES IN AND THROUGH OKLAHOMA.

We used and propose to use a proper and legal method for the laying of pipe lines inside Oklahoma by purchasing from the owners the land or rights of way over, along and under the same for such purpose, and where it is necessary to go under public roads, to secure from the owners on either side of such road the right so to do. We do not occupy any public road longitudinally. We do not deny that Oklahoma

may under her police power, make reasonable and proper regulation to protect the public from the dangers of the transportation of the gas, but we do deny that under the guise of such regulation, she can make such rigorous rules as will wholly prevent such transportation.

Oklahoma does not own the fee of the land over which its public highways are laid. She only owns an easement, and subject to such easement, the owners of the land on either side of the road own to the middle of the land over which the easement runs and on which the public road is located. The owners who thus own the fee of the soil may use the land over which runs the public highway in such way as they desire, provided they do not interfere with the public easement; and one way of lawful use is to lay under the surface crossing the road pipes for water, gas and other commodities.

The state cannot forbid interstate commerce. She cannot do this directly or indirectly. She cannot make impossible the entering into *interstate* commerce of any article of commerce, and she especially cannot deny to any citizen of the United States the right to enter upon her soil for the express purpose of so tranporting. She cannot deny the right of such citizen to use his own property bought in her state or the right bought in her state, for transportation through private property, of the article of commerce he bought.

(*See authorities infra* pp. 83. 85.)

As natural gas is impossible of transportation by barrels or bags or cars or tank cars, or any other ordinary mode, and it can only be transported by pipe lines, it is evident that if the state can forbid such pipe lines being laid on the private property of the transporter, it can

forbid the purchase and sale of the gas, and the exportation of the same; for if the owner of the gas and the transporter of the same cannot take it away from the well the gas is practically useless.

If the state could do this, it could—

(1) Regulate interstate commerce;

(2) Deny to the United States citizen privileges and rights guaranteed to it by the Federal Constitution;

(3) Deny to such citizen the right to engage in interstate commerce in natural gas.

(*See authorities infra*, p. 96.)

DISCRIMINATION.

The Oklahoma Act grants (Section 9) to persons drilling for oil and gas the right to lay surface lines to transport gas to the wells so drilling, and factories wholly located in the state may also transport gas for their own use to their factories after securing the right of way—

"from property owners to their lands."

As this Act *forbids* the laying of pipe lines over private property by United States citizens for the purpose of exporting gas to factories outside of the state, it discriminates against the right of such citizens to engage in interstate commerce, because it grants the right to so lay gas pipes to citizens of Oklahoma drilling their gas wells in the State or running factories therein.

(*See authorities infra* p. 92.)

OWNERSHIP OF THE FEE OF THE HIGHWAYS.

Even if the fee of the highways is in Oklahoma, which we deny—

Yet

Oklahoma cannot in any way "regulate" interstate commerce because all her power so to do she granted to Congress. She cannot do this at all, either directly or indirectly.

To forbid the carrying out of the state of natural gas found within it is a direct and palpable attempt to regulate interstate commerce.

She cannot do so by direct legislation.

She cannot do so by devious legislation which accomplishes the same result.

She cannot do so by the use of any of her powers as a sovereign, no matter what the particular sovereign power is.

Her power over the highways of the state, even if her interest could be called a fee (which we deny), is not the ownership of the soil to the same extent and purpose as a private person owns his property. She owns the highways but subject to and for the use of the public, and this includes for the use of all United States citizens who desire to engage in interstate commerce, or for any purpose to traverse the same. Her ownership is as a sovereign, and is possessed in much the same way as she has the power of legislation.

She cannot use such qualified ownership, such sovereign power, to prevent the United States citizen from engaging in interstate commerce, and from transporting out of the state articles of such commerce, even if in such transportation some slight use of the soil beneath the highways is made to enable the transportation to be carried on.

Natural gas cannot be transported except by pipe lines, which, it is admitted, may be laid and used without danger to the public, and which Oklahoma heretofore has permitted and which Congress permitted in this very territory before Oklahoma became a state; and while the permanent and unreasonable occupation of the surface might be prevented because it deprived the public of the

free right to use the same, such objection is untenable where the only use is by a pipe line laid three feet beneath the surface, and so as not in the least to prevent the use of the surface by the public, which is not an exclusive use because other pipe lines may use it for the same purpose, as well as other instruments of transportation which require continuity of connection.

If the Court is satisfied that the denial of such use by Oklahoma is not to protect the public from danger, but merely to prevent one from engaging in interstate commerce and carrying gas out of Oklahoma, it should declare the statute void, because here again, through one of its powers of sovereignty, Oklahoma is regulating interstate commerce.

(A thorough examination of the rights of the State of Oklahoma in the highways will be found *infra*, page 100).

The court below stated the law of Oklahoma as to highways thus:

> "The lands involved in these suits, and all lands within the jurisdiction of this court, comprised what was known as Indian Territory. The fee to the rural public highways in that portion of this state formerly comprising Indian Territory, and now the Eastern district, does not vest in the state for the benefit of the whole people, as premised by the defense; but it does vest in the abutting landowners. The public have only a perpetual servitude or easement therein, and the abutting landowner may use the highway for his

own benefit and enjoyment in such manner as is not inconsistent with the superior rights of the public to pass over, maintain and improve the easement granted; whereas, the public streets, squares, alleys, and other public places of cities of this country, as a very general rule, by act of public dedication by the owner and founder, pass to the city in its corporate capacity for the benefit of the public, absolutely in fee, for use, enjoyment, control, and disposition by the corporation. For this reason, in our judgment, the authorities cited by solicitors for the defendants do not apply.

"It has ever been the rule of the common law that the fee of highways vested in the abutting landowners, and not in the state. Mr. Justice Story, delivering the opinion of the court in *United States vs. Harris*, 1 Sumn., 21, Fed. Cas. No. 15, 315, said:

> 'The general principal of the common law is that the soil over which a street or highway is laid still remains the property of the original owner, subject to the easement.' * * *

"These lands were, until recently, the tribal property of the Cherokee, Creek, Choctaw, Chickasaw, and Seminole tribes of Indians, not subdivided by survey, and without legally defined public highways. Recently they have been surveyed, and by separate acts of Congress as to each tribe, based upon tribal agreements, have been allotted to the individual Indians in severalty, with a view to statehood, which soon followed. In these various acts of Congress provision was made for public highways. As to the Cherokee Nation, wherein lies the particular land involved in these suits, it was provided by Act Cong. July 1, 1902, c. 1375, Sec. 37, 32 Stat., 722:

'Public highways or roads two rods in width, being one rod on each side of the section line, may be established along all section lines without any compensation being paid therefor, and all allottees, purchasers and others shall take the title to such land subject to this provision.'

"Similar provisions were contained in the acts relating to the other nations, providing for public highways of various widths, but in each case providing that the allottees, purchasers, and others should take title to such lands, subject to the highway rights therein provided for. It is clear, therefore, that the fee to the land comprising rural highways in what was formerly Indian Territory vests in the abuttting landowners, subject only to the easement granted the public for highway purposes, following the rule of the common law."

AUTHORITIES.

THE RIGHT OF A CITIZEN OF THE UNITED STATES TO CARRY ON INTERSTATE COMMERCE IS A PRIVILEGE GUARANTEED BY THE FEDERAL CONSTITUTION, AND IS ENJOYED WITHOUT DISTINCTION BY CORPORATIONS ENGAGED IN INTERSTATE COMMERCE AS WELL AS INDIVIDUALS.

In *Crutcher vs. Kentucky*, 141 U. S., 47, 57, Mr. Justice Bradley said:

> "To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and *the accession of mere corporate facilities*, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject."

This language is quoted with approval in

> *Western Union Telegraph Co. vs. Kansas*, 216 U. S., 1, 21. (1910)

The principle announced in this decision is a conclusive answer to appellant's contention that a natural gas company must obtain from the State of Oklahoma a franchise or license to enter the state and construct its pipe line for interstate

commerce. As this court decided, the individual or corporation needs no such franchise from the state, and the state can exact none. The right to enter a state and carry on interstate commerce, and in so doing to employ the customary instrumentalities, such as pipe lines laid through land privately purchased, is a right guaranteed by the Federal Constitution; it exists independently of the law of the state into which entrance is made. This privilege is not a franchise granted by the state. Under the Federal Constitution the state cannot create or grant such a franchise. The Constitution confers upon Congress the exclusive right to say who shall engage in interstate commerce and upon what terms. And the right to engage in interstate commerce, being conferred by the Constitution of the United States, is subject to no limitation except that imposed by that instrument, namely, the right of Congress to regulate its exercise.

In *Vance vs. W. A. Vandercook Co.*, 170 U. S., 438, 455, the right to engage in interstate commerce as against the State, was asserted by a corporation, and in the opinion of the court it was said:

> "The right of the citizen of another State to avail himself of Interstate Commerce cannot be held to be subject to the issuing of a certificate by an officer of the State of South Carolina, without admitting the power of that officer to control the exercise of the right. But the right arises from the Constitution of the United States; it exists wholly independent of the will of either the lawmaking or the executive power of the State; it takes its origin outside of the State of South Carolina, and finds its support in the Constitution of the United States. *Whether or not it may be exercised depends solely upon the will of the person making the shipment, and cannot be in advance controlled or limited by the*

action of the State in any department of its government."

In *Pullman Company vs. Kansas*, 216 U. S., 56, 69, Mr. Justice White said that corporations as well as individuals enjoyed—

"the right bestowed upon them by the Constitution of the United States to carry on, within a State, an interstate commerce business."

See to the same effect:

Reid vs. Colorado, 187 U. S., 137, 151.

Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 196, 204:

In speaking of the rule that a State cannot regulate or interfere with the right to engage in interstate commerce, Mr. Justice Fields said:

"Nor does it make any difference whether such commerce is carried on by individuals or by corporations."

This sentence was quoted with approval in,

Western Union Telegraph Co. vs. Kas., 216 U. S., 1, 23.

In *Stockton vs. Baltimore & New York R. R. Co.*, 32 Fed., 9, 14, Mr. Justice Bradley, sitting as Circuit Justice, said:

"In carrying on foreign and interstate commerce, corporations, equally with individuals, are within the protection of the commercial power of congress, and cannot be molested in another state by state burdens or impediments."

THE RULE THAT A STATE HAS POWER TO EXCLUDE A FOREIGN CORPORATION FROM DOING BUSINESS WITHIN ITS TERRITORY DOES NOT APPLY TO FOREIGN CORPORATIONS WHICH ARE ENGAGED IN INTERSTATE COMMERCE.

THE STATE MAY NOT EXCLUDE SUCH CORPORATIONS OR DEMAND A LICENSE OR DIRECTLY BURDEN OR INTERFERE WITH THEIR INTERSTATE BUSINESS.

In *Pembina Mining Company vs. Pennsylvania*, 125 U. S., 181, 190, Mr. Justice Field said:—

> "The only limitation upon this power of the State to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the federal government, or where its business is strictly commerce, interstate or foreign. The control of such commerce, being in the federal government, is not to be restricted by state authority."

In *Norfolk & Western Railroad Co. vs. Pennsylvania*, 136 U. S., 114, 118, Mr. Justice Lamar said:—

> "It is well settled by numerous decisions of this court, that a state cannot, under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce, or impose any burdens upon such commerce within its limits."

Crutcher vs. Kentucky, 141 U. S., 47:

In this case a statute of Kentucky which prohibited express companies from carrying on business within its limits unless they obtained a license from the state was held to be unconstitutional.

In the opinion Mr. Justice Bradley said:—

"If a partnership firm of individuals should undertake to carry on the business of interstate commerce between Kentucky and other States, it would not be within the province of the state legislature to exact conditions on which they should carry on their business, nor to require them to take out a license therefor. TO CARRY ON INTERSTATE COMMERCE IS NOT A FRANCHISE OR A PRIVILEGE GRANTED BY THE STATE: IT IS A RIGHT WHICH EVERY CITIZEN OF THE UNITED STATES IS ENTITLED TO EXERCISE UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES; and the *accession of mere corporate facilities,* as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject. * * *

"We have repeatedly decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it. * * *

"But the main argument in support of the decision of the Court of Appeals is that the act in question is essentially a regulation made in the fair exercise of the *police power* of the State. But it does not follow that

everything which the legislature of a State may deem essential for the good order of society and the well being of its citizens can be set up against the exclusive power of Congress to regulate the operations of foreign and interstate commerce. We have lately expressly decided in the case of *Leisy vs. Hardin,* 135 U. S., 100, that a state law prohibiting the sale of intoxicating liquors is void when it comes in conflict with the express or implied regulation of interstate commerce by Congress, declaring that the traffic in such liquors as articles of merchandise between the States shall be free. There are, undoubtedly, many things which in their nature are so deleterious or injurious to the lives and health of the people as to lose all benefit of protection as articles or things of commerce, or to be able to claim it only in a modified way. Such things are properly subject to the police power of the State. Chief Justice Marshall in *Brown vs. Maryland,* 12 Wheat., 419, 443, instances gunpowder as clearly subject to the exercise of the police power in regard to its removal and the place of its storage; and he adds: 'The removal or destruction of infectious or unsound articles is, undoubtedly, an exercise of that power, and forms an express exception to the prohibition we are considering. Indeed, the laws of the United States expressly sanction the health laws of a state.' Chief Justice Taney in the *License Cases,* 5 How., 504, 576, took the same distinction when he said: 'It has, indeed, been suggested, that, if a State deems the traffic in ardent spirits to be injurious to its citizens, and calculated to introduce immorality, vice and pauperism into the State, it may constitutionally refuse to permit its importation, notwithstanding the laws of Congress; and that a State may do this upon the same principles that it may resist and prevent the introduction of disease, pestilence and pauperism from abroad. But it must be remembered that disease, pestilence and

pauperism are not subjects of commerce, although sometimes among its attendant evils. They are not things to be regulated and trafficked in, but to be prevented, as far as human foresight or human means can guard against them. But spirits and distilled liquors are universally admitted to be subjects of ownership and property, and are therefore subjects of exchange, barter and traffic, like any other commodity in which a right of property exists.'"

In *Horn Silver Mining Co. vs. New York*, 143 U. S., 305, 314-315, speaking of the rule of law which permits a state to exclude foreign corporations, Mr. Justice Field said:

"Only two exceptions or qualifications have been attached to it in all the numerous adjudications in which the subject has been considered, since the judgment of this court was announced more than half a century ago in *Bank of Augusta vs. Earle*, 13 Pet., 519. One of these qualifications is that the State cannot exclude from its limits a corporation engaged in interstate or foreign commerce, established by the decision in *Pensacola Telegraph Co. vs. Western Union Telegraph Co.*, 96 U. S., 1, 12. The other limitation on the power of the State is, where the corporation is in the employ of the general government."

In the recent case of *Western Union Telegraph Co. vs. Kansas*, 216 U. S., 1, 27 (1910), after a very extensive review of the decisions, Mr. Justice Harlan summarized the law thus:—

"On the contrary, it is to be deduced from the adjudged cases that a corporation of one State, authorized by its charter to engage in lawful commerce among the States, may not be prevented by another State from coming into its limits for all the legitimate purposes of such

commerce. It may go into the State without obtaining a license from it for the purposes of its interstate business, and without liability to taxation there, on account of such business."

In the case of *Pullman Co. vs. Kansas,* 216 U. S., 56, 67 (1910), Mr. Justice White, after stating a series of propositions, the third of which conceded the right of a state to exclude a foreign corporation from doing business within its borders, added:—

"The absolute power of the State, as stated in the preceding proposition, does not include the right to exclude a foreign corporation from doing in a state interstate commerce business, since the regulation of such business is vested by the Constitution in Congress, and the States are impotent, as stated in the first and second propositions, to directly burden the right to do such business or to discriminate against those doing it. *Crutcher vs. Kentucky,* 141 U. S., 47. And, indeed, by necessary implication, the want of power in the States to exclude corporations as well as individuals from carrying on within their borders interstate commerce results, by implication, from the decisions in the cases previously cited under proposition 3."

CONGRESS HAS EXPRESSLY DECLARED THAT NATURAL GAS IS A LAWFUL SUBJECT OF COMMERCE; AND HAS MADE PROVISION AUTHORIZING THE TRANSPORTATION OF THE SAME IN PIPE LINES.

Prior to the admission of Oklahoma to statehood on November 16, 1907, the lands in controversy in this case were parts of Indian Territory, occupied by Indian tribes, and were under the jurisdiction of the Department of the Interior.

The Act of Congress of March 11, 1904, c. 505 (33 Stat. L., 65), provided:—

> "That the Secretary of the Interior is hereby authorized and empowered to grant a right of way in the nature of an easement for the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas through any Indian reservation, through any lands held by an Indian tribe or nation in the Indian Territory, through any lands reserved for an Indian agency or Indian school, or for other purpose in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, upon the terms and conditions herein expressed."

Under the Act of Congress of June 16, 1906 (34 St. L., 267) passed to enable the people of Oklahoma to form a state, the United States retained jurisdiction over lands occupied as Indian reservations, and a great part of the rights of way of the plaintiff companies was acquired by grant from the Secretary of the Interior under the foregoing provision of the Act of March 11, 1904.

AN ATTEMPT BY A STATE TO SELECT THE ARTICLES OF COMMERCE WHICH MAY OR MAY NOT ENTER INTO INTERSTATE TRADE, OR PROHIBIT ANY ARTICLES OF COMMERCE LOCATED IN THE STATE FROM SO DOING, IS A REGULATION OF COMMERCE WHICH IS VOID.

In *Leisy vs. Hardin,* 135 U. S., 100, 108, the Supreme Court declared unconstitutional a statute of the State of Iowa prohibiting the importation of intoxicating liquors within its territory.

In the opinion, Chief Justice Fuller said:

"The power vested in Congress 'to regulate commerce with foreign nations, and among the several States, and with the Indian tribes,' is the power to prescribe the rule by which that commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution. It is co-extensive with the subject on which it acts and cannot be stopped at the external boundary of a State, but must enter its interior and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the comman mass of property within the territory entered. *Gibbons vs. Ogden,* 9 Wheat. 1; *Brown vs. Maryland,* 12 Wheat. 419. * * *

"Whenever, however, a particular power of the general government is one which must necessarily be exercised by it, and Congress remains silent, this is not only not a concession that the powers reserved by the States may be exerted as if the specific power had not been elsewhere reposed, but, on the contrary, the only

legitimate conclusion is that the general government intended that power should not be affirmatively exercised, and the action of the States cannot be permitted to affect that which would be incompatible with such intention. Hence, inasmuch as *interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the States so to do, it thereby indicates its will that such commerce shall be free and untrammelled.* * * *

"It is there (*Bowman vs. Chicago, etc., Ry. Co.*) shown that the transportation of freight or of the subjects of commerce, for the purpose of exchange or sale, is beyond all question a constituent of commerce itself; that this was the prominent idea in the minds of the framers of the Constitution, when to Congress was committed the power to regulate commerce among the several States; that the power to prevent embarrassing restrictions by any State was the end desired; that the power was given by the same words and in the same clause by which was conferred power to regulate commerce with foreign nations; and that it would be absurd to suppose that the transmission of the subjects of trade from the State of the buyer, or from the place of production to the market, was not contemplated, for without that there could be no consummated trade, either with foreign nations or among the States. It is explained that where State laws alleged to be regulations of commerce among the States have been sustained, they were laws which related to bridges or dams across streams, wholly within the State, or police or health laws, or to subjects of a kindred nature, not strictly of commercial regulation. But the transportation of passengers or merchandise from one State to another is in

its nature national, admitting of but one regulating power: and it was to guard against the possibility of commercial embarrassments which would result if one State could directly or indirectly tax persons or property passing through it, or prohibit particular property from entrance into the State, that the power of regulating commerce among the States was conferred upon the federal government.

"* * * Can it be supposed that by omitting any express declaration on the subject, Congress has intended to submit to the several States the decision of the question in each locality of what shall and what shall not be articles of traffic in the interstate commerce of the country? If so, it has left to each State, according to its own caprice and arbitrary will, to discriminate for or against every article grown, produced, manufactured or sold in any State and sought to be introduced as an article of commerce into any other. If the State of Iowa may prohibit the importation of intoxicating liquors from all other States, it may also include tobacco, or any other article, the use or abuse of which it may deem deleterious. It may not choose, even, to be governed by considerations growing out of the health, comfort or peace of the community. Its policy may be directed to other ends. It may choose to establish a system directed to *the promotion and benefit of its own agriculture, manufactures or arts* of any description, and prevent the introduction and sale within its limits of any or of all articles that it may select as coming into competition with those which it seeks to protect. The police power of the State would extend to such cases, as well as to those in which it was sought to legislate in behalf of the health, peace and morals of the people. In view of the commercial anarchy and confusion that would result from the diverse exertions of power by the

several States of the Union, it cannot be supposed that the Constitution or Congress have intended to limit the freedom of commercial intercourse among the people of the several States."

In *County of Mobile vs. Kimball*, 102 U. S., 691, 697, Mr. Justice Bradley said:

"'The subjects, indeed, upon which Congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character, and admit and require uniformity of regulation, affecting alike all the States; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. Of the former class may be mentioned *all that portion of commerce* with foreign countries or between the States *which consists in the transportation, purchase, sale, and exchange of commodities.* Here there can of necessity be only one system or plan of regulations, and that Congress alone can prescribe. Its non-action in such cases with respect to any particular commodity or mode of transportation is a declaration of its purpose that the commerce in that commodity, or by that means of transportation, shall be free. There would, otherwise, be no security against conflicting regulations of different States, each *discriminating in favor of its own products and citizens and against the products of citizens of other States.* And it is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the States was to insure uniformity of regulation against conflicting and discriminating state legislation."

Welton vs. State of Missouri, 91 U. S., 275, 279:—

A statute of Missouri imposed a license tax upon persons who sold goods which were the "growth", "product" or "manufacture" of another State. No license was required for selling similar goods which were produced within the State.

The Supreme Court held that this statute was in conflict with the power of Congress to regulate interstate commerce. In its opinion Mr. Justice Field said:

> "The power to regulate conferred by that clause upon Congress is one without limitation; and to regulate commerce is to prescribe rules by which it shall be governed,—that is, the *conditions upon which it shall be conducted*; to determine how far it shall be free and untrammelled, how far it shall be burdened by duties and imposts, and how far it shall be *prohibited.* * * *
>
> *"The power to regulate it embraces all the instrument by which such commerce may be conducted.* * * *
>
> "It will not be denied that that portion of commerce with foreign countries and between the States which consists in the transportation and exchange of commodities is of national importance, and admits and requires uniformity of regulation. The very object of investing this power in the General Government was to insure this uniformity against discriminating State legislation. (279-280) * * *
>
> "The power which insures uniformity of commercial regulation must cover the property which is transported as an article of commerce from hostile or interfering legislation, *until it has mingled with and become a part of the general property of the country,* and subjected like it to similar protection, and to no greater burdens. If, at any time before it has thus *become incorporated into the mass of property of the* state or *nation,* it can be subjected to any restrictions by State

legislation, the object of investing the control in Congress may be entirely defeated. (281) * * *

"The fact that Congress has not seen fit to prescribe any specific rules to govern interstate commerce does not affect the question. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammelled. As the main object of that commerce is the sale and exchange of commodities, the policy thus established would be defeated by discriminating legislation like that of Missouri." (282)

Woodruff vs. Parham, 8 Wall., 123, 140:—

In this case the Supreme Court upheld a tax on sales of merchandise which made no discrimination "against citizens or products" of another State.

In stating the reasons of the court, Mr. Justice Miller said:

"There is no attempt to *discriminate injuriousiy against the products of other States* or the rights of their citizens, and the case is not, therefore, an attempt to fetter commerce among the States, or to deprive the citizens of other States of any privilege or immunity possessed by citizens of Alabama. But a law having such operation would, in our opinion, be an infringement of the provisions of the Constitution which relate to those subjects, and therefore void. There is also, in addition to the restraints which those provisions impose by their own force on the States, the unquestioned power of Congress, under the authority to regulate commerce among the States, to interpose, by the exercise of this power, in such a manner as to prevent the States from any oppressive interference with the *free interchange of commodities by the citizens of one State with those of another.*"

Railroad Company vs. Husen, 95 U. S., 465, 469-470:—

A statute of Missouri prohibited Texan, Mexican or Indian cattle to be driven into or remain in the State of Missouri between March and November. The Supreme Court held that the act was an attempted regulation of interstate commerce and was void. The court said:

> "It is a plain regulation of interstate commerce, a regulation extending to *prohibition.* Whatever may be the power of a State over commerce that is completely internal, it can no more prohibit or regulate that which is interstate than it can that which is with foreign nations. Power over one is given by the Constitution of the United States to Congress in the same words in which it is given over the other, and in both cases it is necessarily exclusive. That the transportation of property from one State to another is a branch of interstate commerce is undeniable, and no attempt has been made in this case to deny it.
>
> "The Missouri statute is a plain interference with such transportation, an attempted exercise over it of the highest possible power, that of destruction. * * * The object and effect of the statute are, therefore, to obstruct interstate commerce, and to discriminate between the property or citizens of one State and that of citizens of other States. * * * Transportation is essential to commerce, or rather it is commerce itself; and every obstacle to it, or burden laid upon it by legislative authority, is regulation."

See to the same effect:

Schollenberger vs. Pennsylvania, 171 U. S., 1, 12-13.

A STATE STATUTE PROHIBITING THE EXPORTATION OF PRIVATE PROPERTY OUT OF THE STATE IS VOID AS AN ATTEMPT TO REGULATE INTERSTATE COMMERCE.

In *Reid vs. Colorado*, 187 U. S., 137, 151, Justice Harlan said:—

> "Now, it is said that the defendant has a right under the Constitution of the United States to ship live stock from one state to another state. This will be conceded on all hands."

The same rule has been applied to restrictions upon the right of individuals to pass out of a state.

Crandall vs. State of Nevada, 6 Wall., 35:—

A statute of the State of Nevada imposed a capitation tax of one dollar upon every person leaving the state by any railroad or other vehicle employed in transporting passengers for hire.

The Supreme Court held this statute unconstitutional as in conflict with the commerce clause of the Constitution.

Hall vs. De Cuir, 95 U. S., 485, 488:—

The Supreme Court held a state statute which provided that carriers of passengers should give all persons equal privileges without discrimination on account of race or color, unconstitutional as applied to a steamboat carrying passengers in and out of a state. It was there said:

> "But we think it may safely be said that state legislation, which seeks to impose a direct burden upon interstate commerce, or *to interfere directly with its freedom*,

does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the State, but directly upon the business as it comes into the State from without *or goes out from within.*"

In *Welton vs. State of Missouri,* 91 U. S., 275, 281, Mr. Justice Field said:

> "The power which insures uniformity of commercial regulation must cover the property which is transported as an article of commerce from hostile or interfering legislation, *until it has mingled with and become a part of the general property of the country,* and subjected like it to similar protection, and to no greater burdens. If, at any time before it has thus *become incorporated into the mass of property of the state or nation,* it can be subjected to any restrictions by State legislation, the object of investing the control in Congress may be entirely defeated."

The same considerations must determine the question of the power of a state to prohibit exports, as determine the question of its power to prohibit imports, of lawful articles of private property. If all the states were to refuse to permit articles produced within their boundaries to be transported out of their limits, commerce between the states would be terminated as completely as if all the states declined to allow the importation of produce from other states. Either form of prohibition would put an end to all commercial intercourse between the states.

Therefore, no distinction exists between the right of a state to prohibit exports and its right to prohibit imports,

where the commodity involved is private property which is the subject of individual ownership, and is not property which is owned by the state or by the people as a whole, and in which the individual has no right except that of use or appropriation, such as game or the waters of a public river.

Cooke on the Commerce Clause of the Federal Constitution, Sec. 61, lays down the principle:—

> "Although the question of the validity of restrictions imposed under authority of a State more frequently arises with reference to transportation out of the State, it seems clear enough that, so far as concerns such question, there is no substantial distinction between transportation into, and transportation out of, the State, whether of property or of persons."

State of Indiana ex rel. Corwin vs. Indiana Oil & Gas Company, 120 Ind., 575, 6 L. R. A., 579 (1889):

The Supreme Court of Indiana held that a statute prohibiting the transportation of natural gas by pipe lines from any point within a state to any point beyond its limits was unconstitutional.

Chief Justice Elliott said:

> "The appellee's counsel contend that the Act of March 9, 1889, is invalid because it is inter-state commerce legislation, and such legislation must be exclusively federal. In order to give any force to this contention, it is necessary to determine at the outset whether natural gas can be considered an article of commerce. With this preliminary question we have but little difficulty. Natural gas is as much an article of commerce as iron ore, coal, petroleum or any other of the like products of the earth. It is a commodity

which may be transported, and it is an article which may be bought and sold in the markets of the country, (582) * * * *

"The gas in the earth may not be a commercial commodity; but when brought to the surface and placed in pipes for transportation, it must assume that character as completely as coal in the cars, or petroleum in the tanks. We suppose it clear that Pennsylvania could not prohibit the transportation of coal or petroleum to another State, and there is no difference in principle between cases where coal is the commodity affected and those in which it is natural gas. It is no doubt true that there is a point at which a natural or manufactured product is not an article of commerce; but when it assumes such a form as fits it for transportation from State to State, it is, so far as the law of interstate commerce is concerned, transformed into a commercial commodity. For the purposes of taxation, an article of property may not be regarded as a commercial commodity until it has started on its way from one State to another; but property that may become an article of commerce cannot be kept in the State where it was produced, by a state law forbidding its transportation. *Coe vs. Errol*, 116 U. S., 517 (29 L. Ed., 715).

"If this were not so, then not only might coal or petroleum be kept within the State in which it was produced, but so might corn and wheat, cotton and fruit, and lead and iron. If such laws could be enacted and enforced, a complete annihilation of interstate commerce might result; and it was to prevent the possibility of such a result that the provision vesting exclusive power in the federal government was written in the National Constitution. *State vs. Woodruff S. & P. Coach Co.*, 114 Ind., 155, 13 West. Rep., 311. (582). * * *

"In this instance, there is no attempt to regulate the business of mining, except in so far as that business may be connected with transporting natural gas out of the State. The principal object, and, indeed, it is not too much to say, the sole object, of the Statute is to prevent persons from conveying gas into another State; and the provisions of the Act as to the sinking of wells is so bound up with the provisions designed to effect the principal object that separation cannot be made without completely destroying the Statute, and substituting another for it, by judicial construction. (582) * * *

"But it is evident that the Act under consideration cannot, under the rule laid down by the court of last resort, be deemed a legislative exercise of the police power. The Act does not assume to provide for the safety, health or comfort of the citizens; but its object is to prevent the sinking of gas wells, and the laying of pipe lines, by persons who desire to convey gas out of the State. It is not a regulation of the mode of procuring, transporting or using natural gas designed to secure the health, safety or comfort of the citizens of Indiana. (583) * * * * It is not in the power of the Legislature to prevent one citizen from buying or another from selling property. The rights of property are not subject to such absolute legislative control. It is unnecessary to determine to what limitations the general rule we have stated is subject, for it is enough to assert the general rule, and affirm that it applies to such property as natural gas, petroleum and coal" (584).

The decision holding this statute unconstitutional was reaffirmed in—

Manufacturers' Gas Co. vs. Indiana Natural Gas Co., 155 Ind., 545, 53 L. R. A., 134 (1900):

In this case the fact of the limited supply of natural gas and of the necessity of conservation in the State of Indiana was held to be immaterial.

The Supreme Court said:

"The only reason which can be urged in support of the restraint sought to be imposed upon the appellee is that, *the supply of natural gas being limited,* and the article being one of great value and convenience, its use ought to be reserved for and enjoyed by the people of this state, to the exclusion of the inhabitants of any other state. *But, as natural gas, when reduced to possession, is held to be a commercial commodity, its owner cannot lawfully be prevented from carrying it to and selling it in whatever market he may consider most advantageous.* It is true that the Supreme Court of the United States has recently held in *Geer vs. Connecticut,* 161 U. S., 519, 40 L. ed., 793, 16 Sup. Ct. Rep., 600, that a statute prohibiting the transportation of wild game beyond the limits of the state in which it is taken or killed is not in conflict with the Constitution of the United States. But the distinction between animals *ferae naturae* and natural gas in respect of their ownership before reduction to possession is a very plain one, and has been clearly pointed out in numerous decisions. *Manufacturers' Gas & Oil Co. vs. Indiana Natural Gas & Oil Co.* (at May term), 50 L. R. A., 768, 57 N. E., 912. In the case of wild animals, before they are reduced to possession, the ownership is in the public, and not in any private person; and they are therefore held to be subject to the protection of the sovereign. The privilege of taking, killing, and transporting them may, on this ground, be regulated by the legislature. As to natural gas, however, the public has no title to, or control over, the gas in the ground. On the contrary, so far as it is susceptible of ownership, it belongs to the

owners of the superincumbent lands in common, or, at least, such landowners have a limited and qualified ownership in it to the entire exclusion of the public.

To the extent that the act of March 9, 1889, attempts to prohibit the owner of natural gas which has been reduced to possession by proper and lawful means from transporting it by safe and reasonable vehicles or conduits out of the state of Indiana, it contravenes the provisions of the Federal Constitution relating to interstate commerce, and is therefore void."

In *Ohio Oil Co. vs. Indiana*, 177 U. S., 190, 205, Mr. Justice White in reviewing the Indiana decisions refers to the foregoing case of *State vs. Indiana Gas Co.*, as follows:

"In *State ex rel. Corwin vs. Indiana & Ohio Oil, Gas & Mining Co.*, 120 Indiana, 575, a law of the State of Indiana which made it unlawful for any person to conduct natural gas beyond the State, and imposing penalties for so doing, was assailed as unconstitutional because repugnant to the commerce clause of the Constitution of the United States. The court held the statute to be void for the asserted cause. The property in natural gas when reduced to actual possession was decided to be like any other property, and therefore the subject of commerce, and within the protection of the Constitution of the United States."

Benedict vs. Columbus Construction Company, 49 N. J. Eq., 23 (1891):

The defendant company entered into a contract with an Indiana corporation by which the defendant agreed to purchase a right of way and construct and maintain a pipe line and furnish pumping machinery for the transportation of natural gas from wells in the State of Indiana to Chicago,

Illinois. A stockholder in the defendant company filed a bill to enjoin the carrying out of the contract on the ground that it was in violation of a statute of Indiana.

The statute complained of was adopted after the earlier legislation was held unconstitutional by the Indiana Supreme Court in the foregoing decisions; and prohibited the use of pumps in the transportation of natural gas in such a way that it would be impossible to transport natural gas to Chicago without violating the statute.

The New Jersey Court of Chancery held that the statute was unconstitutional for these reasons:

> "I cannot escape the conviction that the purpose of the provision considered was to prevent the transportation of gas without the territorial limits of Indiana.
>
> "Such a purpose is unlawful, in that it seeks to impose a burden upon interstate commerce which directly and substantially interferes with its freedom, for it is admittedly impossible to transport gas, with commercial profit, in any other way than through pipes.
>
> "Until the national congress interferes by regulating the transportation of natural gas from state to state, it being admittedly a dangerous commodity, the several states may make a reasonable regulations for the protection of the life and health of their citizens against it, and such regulations, when not directed against interstate commerce, but only incidentally and necessarily affecting it, will be upheld as valid. (38-39) * * *
>
> "But where the state law steps beyond the lawful domain of police regulation and, under its guise or otherwise, seeks by its legislation to restrict interstate commerce, such legislation becomes invalid. (39) * * * I think that they very satisfactorily exhibit that the

provision of the statute of Indiana of March 4th, 1891, which I now consider, is objectionable to the freedom of interstate commerce." (42).

Cooley on Constitutional Limitations (7th ed.), p. 858:—

"Nor can a State forbid the conduction from it of natural gas in pipes."

Jackson Mining Co. vs. Auditor General, 32 Mich., 488:—

A statute of Michigan imposed a tax of 1½ cents per ton on all iron ore mined in the State and exported from the State before being smelted. The purpose of the law was to induce the ore to be smelted in the State by local industries.

The Supreme Court of Michigan held the statute unconstitutional as a regulation of interstate commerce. The decision is of more than ordinary weight because of the fact that the opinion was written by Judge Cooley. He said:

"Various objections are made to the act, but we shall notice but one. That is, that *such a tax is a tax on interstate commerce. It is so in express terms.* It says plainly and specifically to these several companies, 'for every ton of mineral mined by you, you shall pay one cent and a half for the privilege of transporting it from the state for reduction.' The purpose is manifest; it is to induce the working up of the mineral within the state. But this is only an application of the doctrine of protection, not only as between the state and foreign countries, but also as between the several states."

MacNaughtan Co. vs. McGirl, 20 Mont., 124, 38 L. R. A., 367, 372:—

A statute of Montana provided that every foreign corporation, before it might do business in that State, should file a certificate with the Secretary of State designating a local agent upon whom service of process might be made. The statute also provided that if any foreign corporation failed to comply with this provision, all its contracts made within the State should be void.

The plaintiff, a foreign corporation, through an agent made a contract in the State of Montana for the purchase and consignment to its eastern office of wool grown within the State of Montana.

The Supreme Court of Montana held that the transaction in question was interstate commerce and that as applied to it the statute was unconstitutional and the plaintiff might recover upon the contract as if the statute had never been passed.

After an exhaustive review of the Federal decisions, the court in its opinion said:

> "It is just as much an interstate commerce transaction to export wool from Montana to New York as it is to import clothes made of the wool from New York to Montana. Either transaction is interstate commerce, and neither can be interfered with by local law."

A STATE MAY NOT EXERCISE ITS POLICE POWERS IN SUCH A MANNER AS TO PROHIBIT OR DIRECTLY INTERFERE WITH INTERSTATE COMMERCE.

The Federal Constitution vested in Congress the exclusive right to regulate interstate commerce. If a police law of a State comes in conflict with a positive regulation of commerce by Congress, the former must yield.

The same conclusion follows in the absence of express legislation by Congress, if a State statute seeks to make regulations concerning a question of interstate commerce which is national in character and admits of but one uniform rule of regulation. In the latter case, the silence of Congress amounts to a declaration that that portion of commerce shall be free from State interference, and as effectually bars any exercise by the State of its police powers as if Congress had expressly declared against the exercise of such right.

In the present case, whether interstate transportation of natural gas shall be allowed or prohibited—whether or not there shall be interstate commerce at all in natural gas,—can admit of but one answer. It is clearly such a question as requires one uniform rule of regulation. Congress has affirmatively declared that natural gas is a lawful article of interstate commerce, and that the transportation of natural gas by pipe lines is a lawful method of carrying on such interstate commerce. Still, even if Congress had not so provided, the question whether natural gas may enter into interstate commerce is one which admits of but one rule,

and the silence of Congress would amount to a declaration that interstate commerce in natural gas shall be free from prohibition or restraint by the States.

In *Brennan vs. Titusville*, 153 U. S., 289, 302, Mr. Justice Brewer said:

> "It is undoubtedly true that there are many police regulations which do affect interstate commerce, but which have been and will be sustained as clearly within the power of the State; but we think it must be considered, in view of a long line of decisions, that it is settled that nothing which is a direct burden upon interstate commerce can be imposed by the State without the assent of Congress, and that the silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free."

In *Railroad Company vs. Husen*, 95 U. S., 465, 471, speaking of a state statute which was declared to be in violation of the commerce clause of the Federal Constitution, Mr. Justice Strong said:

> "But whatever may be the nature and reach of the police power of a State, it cannot be exercised over a subject confided exclusively to Congress by the Federal Constitution. It cannot invade the domain of the national government. It was said in *Henderson et al. vs. Mayor of the City of New York et al., supra*, to 'be clear, from the nature of our complex form of government, that whenever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied it may be to powers conceded to belong to the States.' Substantially the same thing was said by Chief

Justice Marshall in *Gibbons vs. Ogden,* 9 Wheat, 1. Neither the unlimited powers of a State to tax, nor any of its large police powers, can be exercised to such an extent as to work a practical assumption of the powers properly conferred upon Congress by the Constitution. * * * While for the purpose of self-protection it may establish quarantine, and reasonable inspection laws, it may not interfere with transportation into or through the State, beyond what is absolutely necessary for its self-protection. It may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce."

Guy vs. Baltimore, 100 U. S., 434, 443:—

"In the exercise of its police powers, a State may exclude from its territory, or prohibit the sale therein of any articles which, in its judgment, fairly exercised, are prejudicial to the health or which would endanger the lives or property of its people. But if the State, under the guise of exerting its police powers, should make such exclusion or prohibition applicable solely to articles, of that kind, that may be produced or manufactured in other States, the courts would find no difficulty in holding such legislation to be in conflict with the Constitution of the United States."

In *Morgan vs. Louisiana,* 118 U. S., 455, 464, in discussing the relation between the power of Congress to regulate interstate commerce and the power of the State to enact quarantine laws, Mr. Justice Miller said:

"We do not think it necessary to enter into the inquiry whether, notwithstanding this, it is to be classed among those police powers which were retained by the

States as exclusively their own, and, therefore, not ceded to Congress. For, while it may be a police power in the sense that all provisions for the health, comfort, and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in this court that, even where such powers are so exercised as to come within the domain of Federal authority as defined by the Constitution, the latter must prevail."

In *Leisy vs. Hardin*, 135 U. S., 100, 108, a Statute of the state of Iowa prohibiting the importation of intoxicating liquors within its territory was held unconstitutional, although defended on the ground of the police power of the state.

In the opinion of the Court, Mr. Justice Fuller said:

"* * * while, by virtue of its jurisdiction over persons and property within its limits, a State may provide for the security of the lives, limbs, health and comfort of persons and the protection of property so situated, yet a subject matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the State, unless placed there by congressional action."

See to the same effect:

Henderson vs. Mayor of New York, 92 U. S., 618, 626;

Schallenberger vs. Pennsylvania, 171 U. S., 1, 12;

Missouri-Kansas & Texas Ry. vs. Huber, 169 U. S., 618, 626.

Gibbons vs. Ogden, 9 Wheat, 1, 210;

Jacobson vs. Massachusetts, 197 U. S., 12, 25;

Connolly vs. Union Sewer Pipe Co., 184 U. S., 540, 558.

IN ALL COMMERCIAL REGULATIONS THE UNITED STATES FORM A SINGLE NATION.

In *Cohens vs. Virginia,* 6 Wheat., 264, 413-414, Chief Justice Marshall said:

> "That the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. *In all commercial regulations, we are one and the same people.* In many other respects, the American people are one; and the government which is alone capable of controlling and managing their interests, in all these respects, is the government of the Union. It is their government, and in that character they have no other. America has chosen to be, in many respects, and to many purposes, a nation; and for all these purposes her government is complete; to all these objects, it is competent. The people have declared, that in the exercise of all powers given for these objects, it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory. The constitution and laws of a State, so far as they are repugnant to the constitution and laws of the United States, are absolutely void. These States are constituent parts of the United States. They are members of one great empire—for some purposes sovereign, for some purposes subordinate."

The foregoing passage was quoted with approval in *The Chinese Exclusion Case,* 130 U. S., 581, 604, Field, J.; *Downes vs. Bidwell,* 182 U. S., 244, 377, Harlan, J., dissenting.

In *Legal Tender Cases,* 12 Wall., 533, Justice Strong in the opinion of the court said:

> "Said Chief Justice Marshall, in *Cohens vs. The Bank of Virginia,* (6 Wh. 414) 'America has chosen to be, in many respects and to many purposes, a nation, and for all these purposes her government is complete; for all these objects it is supreme. It can then, in effecting these objects, legitimately control all individuals or governments within the American territory."

In a concurring opinion, Mr. Justice Bradley said (554):

> "The Constitution of the United States established a government, and not a league, compact, or partnership. It was constituted by the people. It is called a government. In the eighth section of Article I it is declared that Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or office thereof. As a government it was invested with all the attributes of sovereignty. It is expressly declared in Article VI. that the Constitution, and the laws of the United States made in pursuance thereof, and all treaties made under the authority of the United States, shall be the supreme law of the land. * * *
>
> "The United States is not only a government, but it is a National government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace, and negotiations and intercourse with other nations; all which are forbidden to the State governments. It has jurisdiction over all those general subjects of legislation and sovereignty which

affect the interests of the whole people equally and alike, and which require *uniformity of regulations* and laws, such as the coinage, weights and measures, bankruptcies, the postal system, patent and copyright laws, the public lands, and *interstate commerce;* all which subjects are expressly or impliedly prohibited to the State governments."

Crandall vs. State of Nevada, 6 Wall., 35, 43:

The Supreme Court held that a statute of the State of Nevada which imposed a capitation tax of $1.00 upon every person leaving the state by any railroad or other vehicle employed in transporting passengers for hire, was void as an interference with interstate commerce.

In its opinion Mr. Justice Miller said:

"The people of these United States constitute one nation. They have a government in which all of them are deeply interested."

Passenger Cases, 7 How., 283, 492:

In this case the Supreme Court held that a law of the State of New York which directed the Health Commissioners to collect a fixed sum from the owners of vessels for every passenger brought from a foreign country into a state, was void as in conflict with the power of Congress to regulate commerce with foreign nations.

In the dissenting opinion Mr Chief Justice Taney said:

"For all the great purposes for which the federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part

of it without interruption, as freely as in our own States."

Railroad Co. vs. Maryland, 21 Wall., 456, 474:

"Should any such system of exactions be established in these States, as materially to impede the passage of produce, merchandise, or travel, from one part of the country to another, it is hardly to be supposed that the case is a *casus omissus* in the Constitution. Commercially, this is but one country, and intercourse between all its parts should be as free as due compensation to the carrier interest will allow."

Stockton vs. Baltimore & N. Y. R. Co., 32 Fed., 9, 17: Mr. Justice Bradley, sitting as Circuit Court Justice, said:

"We think that the power of Congress is supreme over the whole subject, unimpeded and unembarrassed by state lines or state laws; that, in this matter, the country is one, and the work to be accomplished is national; and that state interests, state jealousies, and state prejudices do not require to be consulted. In matters of foreign and interstate commerce there are no states."

See, to the same effect:

Crandell vs. State of Nevada, 6 Wall., 35, 48-49.

In *Martin vs. Hunter's Lessee,* 1 Wheat., 304, 324, Mr. Justice Story said:

"The Constitution of the United States was ordained and established, not by the States in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by '*the people* of the United States.' "

In *McCulloch vs. State of Maryland*, 4 Wheat, 316, 404, 405, Chief Justice Marshall said:

"The *government proceeds directly from the people;* is 'ordained and established' in the name of the people; and is declared to be ordained, 'in order to form a more perfect union, establish justice, insure domestic tranquility, and secure the blessings of liberty to themselves and to their posterity.' The assent of the States, in their sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the State governments. The Constitution, when thus adopted, was of complete obligation, and bound the State sovereignties.

"It has been said, that the people had already surrendered all their powers to the State sovereignties, and had nothing more to give. But, surely, the question whether they may resume and modify the powers granted to government, does not remain to be settled in this country. Much more might the legitimacy of the general government be doubted, had it been created by the States. The powers delegated to the State sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty, created by themselves. To the formation of a league, such as was the confederation, the State sovereignties were certainly competent. But when, 'in order to form a more perfect union,' it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all.

"The government of the Union, then (whatever may be the influence of this fact on the case) is, emphatically and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit. * * * *

"If any one proposition could command the universal assent of mankind, we might expect it would be this: that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all."

HIGHWAYS.

THE REAL PURPOSE OF THE OKLAHOMA STATUTE IN REQUIRING A CHARTER RIGHT TO CROSS A HIGHWAY IS TO PREVENT THE TRANSPORTATION OF NATURAL GAS OUT OF THE STATE—TO DO INDIRECTLY WHAT CANNOT BE DONE DIRECTLY.

The rule of law is well settled, in the language of Mr. Justice White in his concurring opinion in *Pullman Company vs. Kansas*, 216 U. S., 56, 70:

> "The controlling influence of the Constitution may not be destroyed by doing indirectly that which it prohibits from being done directly."

And as Mr. Justice Peckham said in *Collins vs. New Hampshire*, 171 U. S., 30, 34:

> "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect."

Chapter 67 of the Laws of Oklahoma (Record 52) says, in effect, this:

> The sole and only condition upon which you can obtain the right to cross a highway is that you agree in your charter not to transport gas out of the state; and if at any time you do so, you will, *ipso facto*, forfeit all right under your charter to cross a highway.

Section 5 provides that—

> "The laying, constructing, building and maintaining a gas pipe line or lines for the transportation or transmission of natural gas along, over, under, across or through the highways * * * * may only be done *when the right is granted by express charter.*"

Section 2 provides:

> "*No corporation* organized for the purpose of, or engaged in the transportation or transmission of natural gas within this state *shall be granted* a charter * * * * or *right to use the highways* of this state *unless it shall be expressly stipulated* in such charter that it shall only transport or transmit natural gas through its pipe lines to points within this state."

Section 8 provides:

> "Any corporation granted the right under the provisions of this act to * * * * use the highways of this state to construct or maintain a gas pipe line * * * * which shall transport or transmit any natural gas to a point outside of, or beyond this state * * * * shall * * * * forfeit all right granted it or them by the charter from this state."

A condition precedent to obtaining a charter right to cross a highway is that the applicant agree not to transport natural gas out of the state; and as a condition subsequent, it is provided that if natural gas is so transported, the charter right to cross the highway is forfeited.

There is no provision in the Act regulating the manner of crossing the highway with a view to preserving or protecting the surface. The inference is irresistible that the requirement of a charter right to cross a highway is simply an attempt to do indirectly what, under the Constitution, cannot be done directly. The Legislature clearly could not prohibit interstate transportation, as such, of natural gas; it tries to prohibit such transportation indirectly by making a stipulation not to transport gas out of the state a condition precedent to the right to cross highways.

This condition renders the requirement of permission to cross highways and the statute which exacts it unconstitutional, and as if it had never been. The rights in highways, therefore, remain as they existed at common law. The Legislature has made no valid requirement of permission to cross a highway, and the Attorney General can exact none.

At common law it is unquestioned that the abutting owner owns the fee of the highway and has the right to construct or maintain water or gas lines beneath the surface. The authorities to this effect are printed *infra*, pages 100, 114.

TO REQUIRE AS A CONDITION TO OBTAINING THE PRIVILEGE OF CROSSING THE HIGHWAYS THE SURRENDER OF THE CONSTITUTIONAL RIGHT TO ENGAGE IN INTERSTATE COMMERCE IS IN VIOLATION OF THE FEDERAL CONSTITUTION, AND RENDERS THE REQUIREMENT OF PERMISSION TO CROSS HIGHWAYS UNCONSTITUTIONAL AND VOID.

A state cannot evade the mandates of the Federal Constitution by imposing a condition which will absolutely prohibit interstate commerce. As we have seen, a state cannot directly prohibit an individual or a corporation from engaging in interstate commerce in natural gas and transporting the same out of its territory. By the same reasoning a state cannot indirectly prohibit the same by denying the absolutely essential right to cross highways, unless they, as a condition precedent, stipulate that they will not transport the gas out of the state.

The right to engage in interstate commerce in all lawful articles of property is granted by the Federal Constitution to all individuals, whether they carry on such interstate commerce as individuals or under a corporate form of organization. A state cannot directly prohibit or burden or interfere with the exercise of this right. No more can it single out the absolutely necessary right to cross highways and deny the privilege of crossing these highways except upon the condition of the surrender of the constitutional right to engage in interstate commerce. The imposition of such a condition is as clearly within the prohibitions of the Federal Constitution as a law directly prohibiting interstate commerce.

Western Union Telegraph Co. vs. Kansas, 216 U. S., 1 (1910):

A statute of the state of Kansas provided that before a foreign corporation should have authority to do intrastate business within its territory, it should pay to the state a charter fee of a fixed percentage of its entire authorized capital stock, including that employed in interstate as well as intrastate commerce.

The statute imposed no condition on the right to do interstate business so long as the company did not engage in local business, but on the contrary expressly declared that its provisions should not be construed as restricting in any manner the interstate business of the Telegraph Company or its business for the United States Government.

The Telegraph Company refused to pay the required fee and continued to do both local and interstate business within the state.

The state obtained from its courts a decree ousting and restraining the Telegraph Company from doing intrastate business but not interfering with its interstate business.

It was not questioned in this case that the power of the state of Kansas to regulate the local business of the telegraph company was plenary if exercised in a lawful way. The only question was whether the imposition of a burden upon its interstate business as a condition precedent to its right to do intrastate business rendered the requirement as to local business unconstitutional.

The Supreme Court of the United States reversed the decision of the Supreme Court of Kansas, and in its opinion squarely ruled:

(1) The exaction of a percentage of the entire capital stock of the telegraph company, including that employed in interstate commerce outside of the state, operated as a burden on such commerce, and was in violation of the commerce clause of the Constitution;

(2) The requirement of permission to engage in local business within the state was rendered unconstitutional by the condition precedent burdening interstate commerce;

(3) The decision declaring the statute unconstitutional left the company free to carry on its intrastate business as well as its interstate business.

In the opinion of the court Mr. Justice Harlan stated the question involved as follows (34, 35):

> "Whatever may be the extent of the State's authority over intrastate business, was it competent for the State to require that the Telegraph Company—

which surely had the right to enter and remain in the State for interstate business—as a *condition* of its right to continue doing domestic business in Kansas should pay, in the form of a fee, a specified per cent. *of* its capital stock representing the interests, property and operations of the company not only in Kansas but throughout the United States and foreign countries? Is such a regulation consistent with the power of Congress to regulate commerce among the States, or with rights, growing out of such commerce, and secured by the Constitution of the United States? * * * * Can such a regulation be deemed constitutional any more than one requiring the company, as a condition of its doing intrastate business, that it should surrender its right, for instance, to invoke the protection of the Constitution when it is proposed to deprive it of its property without due process of law, or to deny it the equal protection of the laws?"

The learned Justice quoted the language in *Baron vs. Burnside*, 121 U. S., 186, 200, as follows:

"As the Iowa statute makes the right to a permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the Constitution and laws of the United States, the statute requiring the permit must be held to be void. * * * In all the cases in which the court has considered the subject of the granting by a state to a foreign corporation of its consent to the transaction of business in the state, it has uniformly asserted that no conditions can be imposed by the state which are repugnant to the Constitution and laws of the United States." (36).

The question presented was then answered as follows:

"There can be but one answer to this question, namely, that such a condition would operate as a 'direct

burden on interstate commerce, and therefore would be unconstitutional and void. Consistently with the Constitution no court could, by any form of decree, recognize or give effect to or enforce such a condition * * * (37). In order to dispose of this case we need not now go further than to hold, as we do, that for the reasons stated the State was not entitled to the aid of the court in this case; that the affirmative relief asked by it could not have been granted without practically compelling the Telegraph Company as a condition of its doing local business in Kansas that it should surrender rights belonging to it under the Constitution of the United States and secured by that instrument against hostile state action; that any such condition was unconstitutional and void: and that the right of the Telegraph Company to continue doing business in Kansas is not and cannot be affected by that condition." (48).

While in this case the telegraph company did under Act of Congress have the right to enter upon post roads in the State of Kansas, still the legislation of that state did not interfere with rights in post roads and was expressly limited in effect so as not to interfere with the services which the telephone company performed for the United States Government. Hence, the federal grant of the right to use post roads was not a material element in this case, and no reliance was placed upon it in the opinion of the court.

No such federal grant was enjoyed by the Pullman Company as to whom the Supreme Court rendered a similar decision almost simultaneously in the case of—

Pullman Company vs. Kansas, 216 U. S., 56, 62:—

This case arose under the same statute of Kansas.

In the *Pullman Company Case,* Mr. Justice Harlan stated as the conclusions of the court:

> "That the requirement that the company, as a condition of its right to do intrastate business in Kansas, should, in the form of a fee, pay to the State a specified per cent. of its authorized capital, was a violation of the Constitution of the United States, in that such a single fee, based as it was on all the property, interests and business of the company, within and out of the State, was, in effect, a tax both on the interstate business of that company, and on its property outside of Kansas, and compelled the company, in order that it might do local business in Kansas in connection with its interstate business, to waive its constitutional exemption from state taxation on its interstate business and on its property outside of the State contribute from its capital to the support of the public schools of Kansas; that the State could no more exact such a waiver than it could prescribe as a condition of the company's right to do local business in Kansas that it agree to waive the constitutional guaranty of the equal protection of the laws, or the guaranty against being deprived of its property otherwise than by due process of law."

The following language of Mr. Justice White in his concurring opinion in the *Pullman Company Case* is especially applicable to the case at bar (68):

> "As it is obvious that the Pullman Company, in so far as it was engaged in interstate commerce within the State of Kansas, was independent of the will of the State, it follows that the State had no absolute power to exclude the corporation, and therefore no authority to impose an unconstitutional burden as the price for the privilege of doing local in conjunction with the inter-

> state commerce business * * * * the imposition on a corporation which has the right to do interstate commerce business within the State of an unconstitutional burden for the privilege of doing local business is, in my opinion, the exact equivalent of placing a direct burden on its interstate commerce in business. * * * * The only right here (that is, in his opinion) challenged is the authority of a State to impose an unconstitutional tax and validate the tax by making the payment of the unlawful tax a condition of the right to do a local business."

In the *Western Union Telegraph Company* and the *Pullman Company cases*, the statute fixing the terms upon which a foreign corporation might obtain the right to transact local business was declared unconstitutional because it exacted as a condition to securing such right the surrender of the constitutional right to carry on its interstate commerce free from state interference. In the case at bar, the statutory provision requiring a corporation to obtain permission to cross a highway is unconstitutional because, whether invalid or not by itself, it requires as a condition precedent to the right a stipulation by the corporation expressly renouncing the right to engage in interstate transportation of natural gas.

It is obvious that the condition imposed by Chapter 67 of the Laws of Oklahoma is a far more serious and direct interference with interstate commerce than that declared unconstitutional in the Western Union Telegraph and Pullman Company cases. The condition exacted by Oklahoma is one which, if submitted to, requires the absolute surrender of all right to engage in interstate commerce in natural gas.

The reasons urged in the dissenting opinion in the Western Union Telegraph Company and Pullman Company

cases do not apply in the case at bar. In the former cases, the dissenting Justice argued that the state had the absolute power to exclude the telegraph company from intrastate business and so could annex to the grant of such privilege any condition which it chose. The interstate and intrastate portions of the business of the companies were separable, and the companies could elect not to accept the condition and do no local business and still continue their interstate business without danger of interference. But in our case the right to engage in interstate commerce in natural gas and the right to cross highways are not separable. Interstate transportation of natural gas is a physical impossibility unless the company may cross the line of the state highways by laying its pipes beneath the surface.

THE EFFECT OF THE OKLAHOMA STATUTE IN GRANTING THE RIGHT TO CROSS THE HIGHWAYS FREELY FOR INTRASTATE TRANSPORTATION, BUT DENYING THAT RIGHT ABSOLUTELY FOR INTERSTATE TRANSPORTATION, IS A DIRECT AND POSITIVE DISCRIMINATION AGAINST INTERSTATE COMMERCE IN VIOLATION OF THE FEDERAL CONSTITUTION.

As we have seen, under section 67 of the laws of Oklahoma, the right to cross highways can be obtained only by applying for a charter, in which the applicant is required to stipulate that it will not transport natural gas out of the State.

To such applicants as agree not to engage in interstate commerce, the statute directs that the privilege of crossing

highways may be granted; to such as refuse so to agree, the statute peremptorily requires that such permission be refused. This is a palpable and direct discrimination against interstate commerce in natural gas.

In a later statute of the State of Oklahoma, approved March 24, 1909, section 12, it is expressly provided that—

> "Every domestic gas pipe line corporation in this State is hereby given authority to build, construct and maintain gas pipe lines over, under, across or through all highways, bridges, streets or alleys in this State, or any proper place therein, under the supervision of the inspector of oil and gas wells and pipe lines. * * *"

By this statute *domestic* corporations are granted the right to cross highways *ad libitum;* they of course are still restrained by the stipulation in their charter, required by section two of chapter 67, from transporting natural gas out of the state.

It has been repeatedly held by the Supreme Court that a state law which, though in other respects valid, operates so as to discriminate against interstate commerce, is in violation of the commerce clause of the Federal Constitution.

This principle is strongly asserted by Mr. Justice White in his concurring opinion in the case of

Pullman Company vs. Kansas, 216 U. S., 56, 65, 69 (1910):—

Mr. Justice White in that case said:

> "Even though a power exerted by a State, when inherently considered, may not in and of itself abstractly impose a direct burden on interstate commerce, nevertheless such exertion of authority will be a direct burden

on such commerce if the power as exercised operates a discrimination against that commerce, or, what is equivalent thereto, discriminates against the right to carry it on. *Darnell vs. Memphis,* 208 U. S., 113; *Am. Steel & Wire Co. vs. Speed,* 192 U. S., 500, and authorities there cited. (65)

"* * * If a State in express terms enacted that all foreign corporations which availed of the right granted them by the Constitution of the United States to carry on interstate commerce within the State without the previous consent of the State should, as a penalty for not obtaining that consent, be deprived of all right to transact local business, it would not, I assume, be contended that such an enactment was not a discrimination against the corporations to which it applied because of their possession of a right conferred upon them by the Constitution of the United States. And yet such must be the direct and immediate result of applying an absolute act of exclusion to corporations who are not subject to such absolute exercise of power, because of the right bestowed upon them by the Constitution of the United States to carry on within a State an interstate commerce business." (69)

In the *Pullman Company Case,* the State had the admitted power, at its own pleasure, to grant or withhold the right to engage in intrastate commerce within its boundaries. But instead of denying this right absolutely, it granted it only upon the condition that the corporation pay a tax on its property employed in interstate commerce. This requirement was held to be such a burdensome discrimination against interstate commerce as to render the statute unconstitutional.

In the case at bar, the discrimination against interstate commerce is infinitely more hostile and vicious. It grants

permission to cross highways only upon terms which place an absolute embargo upon the interstate transportation of natural gas.

From the foregoing principles it follows that the denial of the right to cross highways in Chapter 67 is unconstitutional, because it compels the surrender of, and discriminates against, the right to carry on interstate commerce. The rights of the appellees in the highways, therefore, stand in every respect precisely as if the Legislature of the State of Oklahoma had never acted upon the subject or attempted to pass any law prohibiting the crossing of highways within its boundaries.

Suppose that a statute were enacted which was not open to these objections, but did, in its operation and effect, deny to all corporations, including those engaged exclusively in interstate commerce, the right to construct lines of transportation across its highways. Would such a prohibition be constitutional as applied to a corporation whose business of interstate commerce rendered it absolutely necessary that it cross the highways?

On the contrary we submit:

A STATE CANNOT PROHIBIT A CORPORATION, WHICH HAS ACQUIRED THE RIGHT OF WAY BY PURCHASE FROM ABUTTING OWNERS, FROM CONSTRUCTING OR OPERATING ITS PIPE LINES ACROSS AND BENEATH ITS HIGHWAYS FOR THE PURPOSE OF INTERSTATE COMMERCE.

The right to engage in interstate commerce, which is guaranteed by the Federal Constitution, includes by necessary implication the right to employ the necessary instrumentalities of commerce, without which such commerce would be impossible. This is ruled by the cases arising under tax laws enacted by some of the states. Not only may a state not tax the privilege of engaging in interstate commerce by requiring the payment of a license fee, but it may not tax the property which affords the instrumentalities for carrying on such commerce, except as it taxes other similar property within its territory.

Thus in *Western Union Telegraph Co. vs. Kansas*, 216 U. S., 1, 26, Mr. Justice White said:

> "The authorities cited show that this court has guarded with both diligence and firmness the freedom of interstate commerce against hostile state or local action, as such action has been manifested by regulations operating, in some instances, directly, in others indirectly, upon *the means or instruments employed in that commerce.*"

Norfolk & Western R. Co. vs. Pennsylvania, 136 U. S., 114, 120.

Transportation in pipe lines is the customary and only practicable method of carrying on interstate commerce in natural gas. The fact that the use of this instrumentality in interstate commerce may be of comparatively recent origin, not generally employed prior to the discovery of oil and natural gas, does not lessen the right to employ the same.

Thus in *Pensacola Telegraph Company vs. Western Union Telegraph Company*, 96 U. S., 1, 9, it was held that the right to engage in interstate commerce included the right to construct and maintain telephone lines as an instrument thereof; and that a state could not prohibit the use of the same upon a right of way purchased from the owner of the land traversed.

Chief Justice Waite said:

"The powers thus granted are not confined to the *instrumentalities of commerce*, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing-vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these *new agencies* are successively brought into use to meet the demands of increasing population and wealth.

> They were intended for the government of the business to which they relate, at all times and under all circumstances."

A corporation cannot engage in the natural gas business without laying pipes. And it is impossible to cross any State or even proceed for any distance within its boundaries without meeting highways. The right to lay pipes beneath and across such highways is absolutely necessary to the conduct of interstate commerce.

It necessarily follows that, when the owners of the pipe line have purchased, as they have done in the case at bar, a right of way through the land abutting on both sides, they may lay their pipes beneath and across the highway.

The law has recognized this necessity and provided for it by permitting public highways to be crossed wherever the public convenience requires.

In *Escanaba Company vs. Chicago,* 107 U. S., 678, 689, Mr. Justice Field said:

> "All highways, whether by land or water, are subject to such crossings as the public necessities and convenience may require, and their character as such is not changed, if the crossings are allowed under reasonable conditions, and not so as to needlessly obstruct the use of the highways."

The power of the State is restricted to the enactment of reasonable police regulations to protect the safety and efficiency of the highways, and where a portion of the highway is actually appropriated to exacting compensation for the same.

The author of Chapter 67 apparently had serious misgivings as to the constitutional power of the State of Oklahoma to prohibit the transportation of natural gas out of its limits. This difficulty was sought to be avoided in the first instance by putting the prohibition in the form of a provision denying the right to transport natural gas, except to corporations which stipulate as a condition precedent in their charter that they will not carry it out of the state. Doubts of the constitutionality of this device also seem to have been entertained. Consequently, with a view to further bolstering up this embargo upon interstate transportation, and to establishing a secondary ground of defense to fall back upon, an attempt was made to rest the statute upon the power of a state over its highways. To this end, Chapter 67 provides in substance and effect that the right to cross highways shall be granted only to corporations which agree in their charter not to transport the gas out of the state. It is submitted that, whatever be the power of the state over its highways, when such power is exercised *bona fide* and of itself, such power cannot be used as a basis for legislation prohibiting and destroying interstate commerce.

Chapter 67 is unconstitutional and of no more force and effect than if it had never been passed. Therefore, the rights of the State of Oklahoma and of the appellee gas companies in the highways are defined by the principles of the common law.

THE RIGHT OF OKLAHOMA IN ITS PUBLIC HIGHWAYS IS A MERE EASEMENT.

THE APPELLEES MAY LAY THEIR PIPE LINES ALONG THE PRIVATE RIGHT OF WAY PURCHASED AND CROSS UNDERNEATH THE SURFACE OF THE HIGHWAY ADJOINING.

Under the common law as declared in the Federal decisions the abutting landowner has title to the soil beneath a public highway, and the public have merely a right of passage.

In *Olcott vs. The Supervisors*, 16 Wall., 678, 697, Mr. Justice Strong said:

> "Even in regard to common roads, generally, the public has no ownership of the soil, no right of possession, or occupation. It has a mere right of passage."

Martin vs. Waddell, 16 Pet., 367, 421:

In this case, Mr. Justice Thompson said:

> "If land over which a public highway passes is conveyed, the soil passes, subject to that use, and the purchaser may maintain an action for an injury to this soil not connected with the use; and whenever it ceases to be used as a public highway, the exclusive right of the

owner attaches; so with respect to the land under water, the public use for passing and repassing, and all the purposes for which a public way may be used, are open to the public, the owner, nevertheless, retaining all the rights and benefits of the soil, that may not impede or interfere with the use as a public highway. Should a coal mine, for instance, be discovered under such highway, it would belong to the owner of the soil, and might be used for his benefit, preserving unimpaired the public highway."

In *United States vs. Harris,* 1 Sumn., 21, Mr. Justice Story, sitting at the circuit, said:

"The general principle of the common law is that the soil over which a street or highway is laid out still remains the property of the original owner subject to the easement."

In *Barclay vs. Howell's Lessee,* 6 Pet., 498, 513, Mr. Justice McLean said:

"By the common law the fee in the soil remains in the original owner, where a public road is established over it; but the use of the road is in the public. The owner parts with this use only, for if the road shall be vacated by the public he resumes the exclusive possession of the ground; and while it is used as a highway, he is entitled to the timber and grass which may grow upon the surface, and to all minerals which may be found below it. He may bring an action of trespass against any one who obstructs the road."

See to the same effect:

Lyman vs. Arnold, 5 Mason, 195, Fed. Cas. No. 8, 626.

THE COMMON LAW RULE PREVAILS IN OKLAHOMA.

In examining into this question it should be borne in mind that the common law rule that the fee is in the abutting owner subject to a mere easement in favor of the public, governs unless the legislation expressly provides to the contrary.

Thus in *Mott vs. Eno,* 181 N. Y., 346, 363, Mr. Justice Grey, speaking of a statute authorizing the laying out of a highway, said:—

> "The general rule is that when the language of the statute will bear a construction which will leave the fee in the landowner, that construction will be preferred. If the title to land in the bed of a highway depends upon presumptions, the general rule seems applicable that only an easement was taken."

Western Union Telegraph Company vs. Krueger, 36 Ind. App., 348, 369:

By the terms of a treaty between the United States and an Indian tribe, the latter did—

> "cede to the United States, a strip of land * * * 100 feet wide for a road."

Subsequently, the territory in question was ceded to the State of Michigan. The court held that the public had an easement only in the road constructed under the terms of this grant. It said that to hold that the fee was in the public would—

> "be contradictory of the presumption of the common law relative to the soil of highways."

The statutes bearing upon the ownership of Oklahoma highways are as follows:

The act of Congress approved July 26, 1866, ch. 262, 14 Stat. L., 253, since embodied in Section 2477 of the Revised Statutes, is the first one we have found. It enacts:

> "The right of way for the construction of highways over public lands, not reserved for public use, is hereby granted."

It will be noticed that this act creates merely a "right of way." No attempt whatever is made to pass a fee.

The next legislative enactment relates to roads in the Oklahoma territory. It is Section 23 of the organic law for the territory, Act of May 2, 1890, chap. 182, 26 Stat. L., 92. It reads as follows:

> "That there shall be reserved public highways four rods wide between each section of land in said Territory, the section lines being the center of said highways; but no deduction shall be made, where cash payments are provided for, in the amount to be paid for each quarter section of land by reason of such reservation. But if the *said highway shall be vacated by any competent authority the title to the respective strips shall inure to the then owner of the tract of which it formed a part by the original survey.*"

Here again it will be noticed that nothing but a "public highway" is reserved. The word "fee" or words equivalent to it are found nowhere in the Act. Furthermore, it directs that no deduction from the purchase price shall be permitted for that portion of the section reserved. Such reserved portions are therefore paid for by the purchaser and must, of

course, be owned by him. Upon the vacation of the highway the use of the land covered by it reverts to the then owner of the tract.

The next legislative act is Section 6072 of the statutes of the territory of Oklahoma (*Wilson's Rev. Stat. of Ter. of Okla. of* 1903), now by the enabling act the law of the entire state (Compiled Laws of Oklahoma, sec. 7816). It reads thus:

> "All section lines in this territory shall be, and are hereby declared to be *public highways.* The said roads or highways shall be 66 feet wide, and shall be taken equally from each side of said section line. That all *roads* or *highways* hereafter laid out or opened upon half section lines shall be the width petitioned for by the petitioners of said road, which shall not be more than 66 feet nor less than 32 feet. Provided, That forest or fruit trees may be planted and grown on all roads more than 50 feet wide to within 25 feet of the center of such highway."

Again we find the use only of the word "highway" and no words sufficient to create a fee, reserve a fee or take away from the owner of the land the fee to the highway, paid for by him under the provisions of Section 23 of the organic law.

The next statutory provisions as to roads in the state are the acts of Congress creating highways in the Creek, Cherokee, Choctaw, Chickasaw and Seminole Indian Nations.

The establishment of the public highways in the Creek Nation was provided by Section 10 of the act of June 30, 1902, chap. 1323, 32 Stat. L., 502, which reads as follows:

> "Public highways or roads 3 rods in width, being 1 and one-half rods on each side of the section line, may be established along all section lines without

any compensation being paid therefor; and all allottees, purchasers and others shall take the title to such lands subject to this provision."

Highways in the Cherokee Nation were established by Section 37, Act of July 1, 1902, chap. 1375, 32 St. L., 722, reading thus:

"Public highways or roads two rods in width, being one rod on each side of the section line, may be established along all section lines without any compensation being paid therefor, and all allottees purchasers and others shall take the title to such lands subject to this provision."

All of the territory of Oklahoma in which the appellees have laid their lines is situated in Washington County, which was originally a part of the lands of the Cherokee Nation.

Highways in the Choctaw, Chickasaw and Seminole Nations of the Five Civilized Tribes by Section 24, Act of April 26, 1906, ch. 1876, 34 Stat. L., 145, reading as follows:

"That in the Choctaw, Chickasaw and Seminole Nations public highways or roads two rods in width, being one rod on each side of the section line, may be established on all section lines; and all allottees, purchasers and others shall take title to such land subject to this provision."

Again we fail to find any words which by the most strained construction could be twisted into reserving a fee in roads. Always the word "highway" is used.

There is one more source from which a law might come creating a fee in the roads. That is the law of Arkansas, which ruled Indian Territory prior to statehood (26 Stat. L., 94). The law of that state vests only an easement

in the public and leaves the fee to all public roads in the abutting owner: *Taylor vs. Armstrong,* 24 Ark., 102; *Reichert vs. Railway,* 51 Ark., 491.

In the first of these cases, decided in 1863, Chief Justice English said:

> "The interest which the public acquires by the deduction of land for a highway is merely an easement or right of passage over the soil, the original owner still retaining the fee, together with all rights of property not inconsistent with the public use."

In the second case cited, decided in 1889, Mr. Justice Hemingway, in delivering the opinion of the court, said:

> "A street is a highway, nothing more, over which the people have a right of passage. The interest of the public in it does not comprehend any interest in the soil. The right of the freehold is unaffected by establishing the highway. Its use by every citizen must be appropriate for the purpose for which it was intended—that is of transit with such stoppage as business necessity, accident or ordinary exigencies of travel may require. The owner of the freehold may make any use of the soil not inconsistent with the public easement."

To return again to the above recited statutes of Congress and the territory of Oklahoma. None of them contains a single word even squinting at ownership in the state. In every instance all that can be claimed of these enactments is that they create a "highway"—that word being the only one used.

What is meant by the word "highway?"

Mr. Angell in his work on Highways Section 1, speaking of the derivation of the word, says:

> "The word 'way' is derived from the Saxon (*waeg weigh*) and means a right of use for passage."

And in Section 2 of the same work in describing the word, he says:

> "Highways are public roads which every citizen has a right to use."

From the *Century Dictionary* we learn that the word highway is derived from the Middle English *heigh weye, heiz waye,* words equivalent to high road, high street and high gate, and we further learn that they have reference to the elevation of such roads above the adjacent surface. The work defines the word thus:

> "A public road or passage; a way open to all passengers by either land or water."

In *Wilde vs. Deig,* 43 Ind., 455, the court, quoting from *Angell on Highways,* said:

> "The word 'way' is derived from the Saxon, and means a right of use for passengers. It may be private or public. By the term 'right of way' is generally meant a private way, which is an incorporeal hereditament of that class of easements, in which a particular person, or particular description of persons have an interest and a right, though another person is the owner of the fee of the land in which it is claimed. * * * A passage, road, or street, which every citizen has a right to use."

Black's Dictionary defines highway thus:

"A free and public road, way or street; one which every person has a right to use."

Abbott's Dictionary:

"A road free to the public; a passage open to all persons."

Wharton's Dictionary:

"Public roads, which every subject of this kingdom has a right to use."

Bouvier's Dictionary:

"A passage, road or street which every person has a right to use."

McAlister, J., in *Morse vs. Sweenie*, 15 Ill., App., 486:

"A highway is a passage open to all the citizens of the state, to go and return, pass and re-pass, at their pleasure."

Fauntleroy, J., in *Bailey vs. Commonwealth*, 78 Va., 19:

"A highway or road is a public passage open to all the people."

Citing: *Holthause's Law Dict.*, 234; *Jacobs' Law Dict.*, 274; *Tomlin's Law Dict.*, 7.

Crocker, J., in *Parsons vs. San Francisco*, 23 Cal., 436:

"The terms 'public highway' are more general in their meaning and include all kinds of thoroughfares in which the public have a right of way for passage."

Elliott in his work on Roads and Streets (sec. 1):

"Ways are either public or private. A way open to all the people is a highway."

Coleridge, C. J., in *Bailey vs. Jamison,* 1 C. P. D., 332, thus sums up the work of the text book writers:

"The common definition of a highway that is given in all the text books of authority is that it is a way, leading from one market town or inhabitated place to another inhabited place, which is common to all the Queen's subjects."

In *Southern Kansas Railway Company vs. Oklahoma City,* 12 Okla., 82, Mr. Justice Hainer, quoting the language of Judge Elliott from his work on *Roads and Streets,* said:

"The term 'highway' is a generic name for all kinds of public ways, including county and township roads, streets and alleys, turnpikes and plank roads, railroads and tramways, bridges and ferries, canals and navigable rivers. In short, every public thoroughfare is a highway."

Thus the definitions and the decisions run. It is always a way, a passage, a use, that is meant by the word "highway," and never a fee in or ownership of the soil.

We do not believe Section 23 of the organic act of Oklahoma territory or Section 6072 of its statutes is applicable to section line roads in Washington County, formerly the Cherokee Nation; because neither of these acts ever, if at all, became operative in that part of the state formerly comprising Indian Territory until statehood, and long before that time roads on all the section lines in the Creek Nation, the Cherokee Nation and the Choctaw, Chickasaw and Semi-

nole Nations had been established by the acts of Congress above referred to. The language of these acts is identical:

> "Public highways or roads. * * * may be established along all section lines, without any compensation being paid therefor."

What construction has been elsewhere placed upon similar language in other state acts?

In Kansas by Chapter 67 of the laws of 1867 and Chapter 57 of the laws of 1869 and Chapter 181 of the laws of 1872 it is enacted:

> "That all section lines * * * are hereby declared to be highways."

Yet in that state the fee to the center of the road belongs to the abutting property owners:

Calkins vs. Matthews, 5 Kan., 191;
Shawnee Co. vs. Beckwith, 10 Ib., 603.

We call to the court's attention Chapter 67 itself, as clearly indicating that neither the mind which conceived it, nor the legislature which passed it, nor the governor who signed it, believed the fee of the roads to be in the state. If they did, clearly the state owned the whole of them from the surface to the stars above and to the center of the earth beneath. It could then drill wells on them, it could sink pipe line in them, and do no more of an injury to the abutting owner than if his neighbor had committed these acts upon his adjoining farm. Now, if it be true that the fee was in the state, why then did Section 5 of the act declare the laying

of a gas line to be an additional burden and forbid the construction of the line until the damages sustained by the adjacent owners were ascertained and paid? It needs no citation of authorities to establish the statement that when a certain use of the public highway is declared an additional burden, it means that the use is not one of those intended in the original dedication of the highway. If, therefore, when the highways of Oklahoma were established the fee passed out of the owner into the state, then the state became an independent owner, and any use which it chose to make of them would not be an additional burden nor cause the abutting owner any damage. But Chapter 67 expressly declares to the contrary.

That the legislature of Oklahoma did not intend that the fee to the highway should be vested in the abutting property owner appears from Compiled Laws of Oklahoma, Sec. 7255:

> "An owner of land bounded by a road or street is presumed to own to the center of the way, but the contrary may be shown."

THE SUPREME COURT OF OKLAHOMA HAS DECIDED THE QUESTION.

We now call the court's attention to a decision of the Supreme Court of Oklahoma handed down on May 10, 1910, in the case of *Coleman vs. Frame*, 26 Okla., 193, 109 Pac., 928, in which were considered the relative rights of the public and of the abutting property owners in the land over which a city street is laid. Mr. Justice Kane, in delivering the opinion of the court, after speaking of the charge and control of municipal authorities over city streets and the paramount authority of the state over them, says:

> "And this primary legislative power over municipal streets is itself subject to the special interest of the abutting property owners therein, which may not be interfered with without fair compensation for the loss actually sustained."

The learned Justice then quotes with approval this language from *Elliott on Roads and Street, Secs.* 403, 411:

> "Individual owners of abutting property have a private interest in the highway distinct from the public, of which they cannot be deprived without compensation. * * *
>
> "We have employed the term 'easement' as descriptive of the estate which the public acquires in a road or street, and we think the term an appropriate and significant one. The later English cases, building upon a distinction, fanciful rather than substantial, hold that the right which the public acquires is not an easement. In our judgment the distinction is too subtle and shadowy to be of any practical utility and is the result of a refinement made at the sacrifice of sound principle. At all events, the use we have made of the term is fully

sanctioned by the earlier English cases and by the American authorities. *We believe that the right of the public is an easement, and that the owner of the fee remains the owner of the soil, springs, mines, quarries, timber and the like,* except in so far as the public officers may have a right to use suitable materials for improving or repairing the road."

The learned Justice, after quoting the foregoing excerpts from *Elliott on Roads and Streets*, says as follows:

"The foregoing authorities make clear, to our mind, the distinction between that class of public utilities which may be owned exclusively by cities, the purchase, construction and repair of which is provided for by section 27, *supra*, and the class in which the municipality has only an easement; *the fee remaining in the abutting owner of the soil.*"

It will be noted that the foregoing language is used in a case arising out of a city street. The language would be still stronger if it were applied to a rural highway, where the rights of the public are still more limited.

Thus it appears that the highways of Oklahoma are mere easements. Upon their establishment nothing passed from the owners of the land but a bare right of way.

Our clients will cross under these roads. They will *not* lay their pipe lines longitudinally along them. They will secure rights of way, and in every case, where it is intended to cross a highway, it will be by a right of way from the owner of the fee.

The Circuit Court in this case, after an exhaustive review of the legislation of Congress and the decisions, held that the fee to the land covered by the highway was in the abutting owner. (172 Fed., 545, 567, 571, *supra*, p. 42).

THE FEE OF THE ROADS BEING IN THE ABUTTING OWNER AND THE PUBLIC HAVING ONLY A BARE RIGHT OF PASSAGE, THE ABUTTING OWNER HOLDS THE RIGHT TO LAY PIPE LINES THEREIN.

It is too clear for argument that when a public highway is condemned, dedicated or is established by prescription, the right to lay gas, water and sewer lines over it and across and under it, either remains vested in the abutting property owners or passes from them to the public at large. It must vest in one or the other. In which one is it?

The right to lay therein lines, pipes and sewers, remains in the owner of the soil on the establishment of the road and does not pass to the public at large. This must be so, as every court but one before whom the question has come has held that the laying of a gas line along a country road is an additional burden upon the abutting land owner, and not one of the original purposes for which the road was established and laid out: *Bloomfield, etc., Gas Light Co. vs. Calkins*, 62 N. Y., 386; *Sterling's Appeal*, 111 Pa., 35; *Kincaid vs. Indianapolis Gas Co.*, 124 Ind., 577; *Consumers' etc., Co. vs. Huntsinger*, 14 Ind. App., 156; *Board of Commissioners vs. Gas Co.*, 134 Ind., 209; *McDevitt et al. vs. Gas Co.*, 160 Pa., 367; *Ward vs. Gas Co.*, 115 Ky., 723.

In *Sterling's Appeal*, 111 Pa., 35, 40, Sterrett, J., in speaking of the rights of the abutting property owner, said:

> "As owner of the land traversed by the public road, he has a right to use it and the land on which it is

located for any purpose that will not impede or interfere with the public travel. By appropriating land for the specific purpose of a common highway, the public acquires a mere right of passage with the powers and privileges incident to such right. The fee still remains in the land owner notwithstanding the public have acquired a right to the free and uninterrupted use of the road for the purpose of passing and repassing; and he may use the land for his own purposes in any way that is not inconsistent with the public easement. He may, for example, *construct underneath the surface passage ways for water* and other purposes, or appropriate the subjacent soil and minerals if any, to any use he pleases, provided he does not interfere with the rights of the public. In other words, the only servitude imposed on the land is the right of the public to construct and maintain thereon a safe and convenient roadway, which shall at all times be free and open for public use as a highway. It is in view of this servitude that damages may be awarded to the land owner. Laying and maintaining a pipe line at the ordinary depth under the surface, necessarily imposes an additional burden on the land, not contemplated either by the owner or by the public authorities, when the land was appropriated for the purpose of a public road. It is a burden, moreover, which to some extent, at least, abridges the rights of the land owner in the soil traversed by the road, and hence it is a taking within the meaning of the constitutional provision requiring just compensation to be made for property taken, injured or destroyed."

The Indiana Supreme Court, through Elliott, J., in the case of *Kincaid vs. Indianapolis Gas Co.*, 124 Ind., 577, said:

"The appropriation of the land for a rural highway did not entitle the local officers to use it for any other than highway purposes, although they did acquire a right to use it for all purposes legitimately connected with the local system of the highways. A use for any other than a legitimate highway purpose is a taking within the meaning of the Constitution, inasmuch as it imposes an additional burden upon the land; and whenever land is subjected to an additional burden the owner is entitled to compensation. The authorities, although not very numerous, are harmonious upon the question that laying gas pipes in a suburban road is the imposition of an additional burden and that compensation must be made to the owner."

In *Bloomfield, etc., Gas Light Co. vs. Calkins,* 62 N. Y., 386, the New York Court of Appeals said:

"The appropriation of land for the use of a highway if for a specific purpose, and the public thereby acquire a mere right of passage, with the powers and privileges which are incident to such a right, the fee of the land still remains in the owner, and he does not become divested of the title because the public have a free and unrestrained right to the use of the same for the purpose of traveling, passing and repassing, on foot, or with animals and vehicles, with the privilege of doing all necessary acts to keep the same in repair. The owner's right is absolute to maintain ejectment or trespass, to use and enjoy the soil, reap any profits arising therefrom, and to use the highway for his individual purposes in any way consistent with the easement or servitude which its appropriation for a road warrant. These principles are elementary and have been settled laws of this State from its earliest organization. * * * No such additional burden as claimed can be imposed

upon the land taken as a public highway, unless we overthrow established principles and cases which have long been regarded as authorities."

From these authorities but one conclusion can be drawn, that the right to lay gas lines along a rural highway never passed out of but continued to remain in the abutting property owners at the time of the original establishment and laying out of the road.

We submit without fear of successful contradiction, that except for the easement—the right of *passage*—enjoyed by the public, the abutting owners own the soil under the road as absolutely as the land adjoining. All rights of property and ownership both above and below the surface of the road are theirs. They may mine under the surface or tunnel the same and use it for water pipes or gas pipes or other purposes of like nature. They may occupy the space above the road, and mine and dig in the earth beneath it. The trees, grass and herbage, which grow upon it, are theirs. They may bring ejectment when wrongful possession has been taken of it. The only restraint or incumbrance upon their title, or their possession, is the easement in the public—the mere right to pass and repass and maintain the highway in condition: *Cooley on Torts* (2nd Ed.), 372; *Jones on Easements*, Secs. 478, 479; *Washburn on Easements* (4th ed.), 252; 3 *Kent's Commentaries*, 433; *Woodruff vs. Neal*, 28 Conn., 167; *Elliott on Roads and Streets*, sec. 690; *Pomeroy vs. Mills*, 3 Vt., 279; *Overman vs. May*, 35 Iowa, 97; *Perley vs. Chandler*, 6 Mass., 454; *Pemberton vs. Dooley*, 43 Mo. App., 176; *Woodring vs. Forks Township*, 28 Pa., 355; *Calkins vs. Matthews*, 5 Kan., 191; *Shawnee Co. vs. Beckwith*, 10 Ib., 603.

Smith vs. Simons, 103 Pa., 32, 35:

Speaking of a pipe laid beneath a street, the court said:

"This ditch was dug for the purpose of laying a pipe for the conveyance of water from a spring to one of the defendant's houses on Willow street. * * * In those days, when water-works are common to all the larger towns, pipes are laid in the streets from which the water supply is drawn both for public and private uses, and although the right thus to lay pipes is usually accorded to a corporation, it by no means follows that it might not be done by private persons acting under municipal authority. Necessity, as was held in the case of the *Commonwealth vs. Passmore,* 1 S. & R., 217, justifies many actions which would otherwise be nuisances. No one has the right to throw wood or stones in the street at his pleasure, nevertheless, as building is necessary, building materials may be laid therein for a reasonable time, and in a convenient manner. So may a merchant occupy the street with his goods; in like manner may the common highways be temporarily opened for the purpose of building vaults under them, or, under like regulations, private drains may be connected with the common sewers or gutters, or houses and other buildings with the streets, by-alleys, doorsteps, and the like. By such things as these, and many others, which are justified by necessity or custom, may public highways be occupied temporarily or permanently, and it would be strange, indeed, if, in the face of all this array of precedents, a private citizen, acting under municipal license, could not, without committing a public nuisance, lay a water-pipe along a street to his house. Such strictness as this would, in some of our county villages, deprive the inhabitants of their water supply altogether,

and would, in many other instances, seriously interfere with the business and comfort of our people."

We might multiply these authorities. The rule obtains wherever the common law governs. It is the law of England. It is the rule in every state in this Union.

The latest decisions indicate no tendency to depart from this rule.

Wells vs. Village of Croton on Hudson, 124 N. Y. Supp., 1050, 1061 (1910):

> "* * * *under the common law the owner of property abutting on a public highway*, who owned the fee thereof, *had a right to lay water pipes under the surface of the street*, for the purpose of carrying water to his dwelling house or farm property; and the plaintiffs' grantees, while owning the spring and the fee of the highway in question, and the property abutting thereon, had a lawful right to lay the pipes in question from the said spring, through and under the surface of the said street, to their respective properties."

Town of Clay vs. Hart, 25 N. Y. Misc., 110, 114 (1908):

> "The public acquired an easement in the highway which the owner of the land could not interrupt; and the title to the soil remained in the owner, and he has the right to every use to which the land can be applied subject to the easement of the public. *He had the right to sink a water-course under the highway upon his own land* for the use of his mill; but he must take care that the highway remains safe for travelers thereon."

Jones, in his work on *Easements* (Secs. 478, 479), says:

> "At common law, the owner of the land abutting upon the highway has all the rights of property in the soil of the highway, subject to the easement of the public. He may mine under it, or he may dig up the soil, provided he does not interfere with the public convenience. He owns the trees growing upon it, and may maintain trespass against any one cutting them or gathering the fruit, or for any other invasion of his possession. The owner in fee of the highway is entitled to the hedges, the crops that grow upon it, and all mines or minerals beneath the surface."

Washburn in his work on *Easements* (4th ed., p. 252), says:

> "Highways, for instance, are regarded as easements. The public acquire by their location right of way, with the powers and privileges incident to that right, such as digging the soil, using the timber and other materials found within the limits of the road, in a reasonable manner, for the purpose of making and repairing the road and its bridges. * * * The former proprietor of the soil still retains his exclusive right in all the mines, quarries, springs of water, timber and earth for every purpose not incompatible with the public right of way. The person in whom is the fee of the road may maintain trespass or ejectment or waste in respect to same. And upon the discontinuance or abandonment of the right of way, the entire and exclusive property and right of enjoyment revest in the proprietor of the soil."

Judge Elliott, in his work on *Roads and Streets,* sec. 690, says:

> "The owner of land abutting upon a highway, as one of the public, has all of the rights to its use that belong to the public generally * * * The presumption is that the adjoining proprietors on each side of a road own to the center. As such owners have the exclusive right to the soil, subject only to the easement of the right of passage in the public and the incidental right of properly fitting the highway for use. Subject only to the public easement, the proprietor has all of the usual rights and remedies of the owner of a freehold. He may sink a drain below the surfare of the road, if proper care be taken to cover it over so that it shall remain safe and convenient. *He may carry water in pipes under the way,* and he may mine under it."

This is the language of Chief Justice Parsons in *Perley vs. Chandler* (6 Mass., 454):

> "But the soil and freehold remains in the owner, although encumbered with a way. And *every use* to which the land may be applied and all the profits which may be derived from it consistently with the continuance of the easement, the owner can lawfully claim. He may maintain ejectment for the land thus encumbered; and if the way be discontinued, he shall hold the land free from this incumbrance. *Upon these principles there can be no doubt but that the owner of the land can sink a drain or any water course below the surface of his land covered with a way, so as not to deprive the public of this easement."*

In *Pemberton vs. Dooley* (43 Mo. App., 176), the question arose as to the right of the abutting owner to maintain a passage way under an ordinary country road, and the court laid down the rule that such abutting owner owned the soil under the road, and that the public had only a right of way, saying:

> "The former proprietor of the soil still retains the exclusive right in all mines, quarries, springs of water, timber and earth for every purpose not incompatable with the public right of way. *We conclude then, that plaintiff, Pemberton, had a right to a passway beneath the surface of the highway, provided he in no way disturbed the public use.*"

In *Starr vs. Camden, etc., R. R. Co.* (24 N. J. L., 597), the Supreme Court of New Jersey said:

> "This easement [of a public highway] does not comprehend any interest in the soil, nor give the public the legal possession of it; the right of a freehold is not touched by the establishing of a highway, but continues in the owner of the land, in the same manner that it was before the highway was established, subject to easement. This principle is so universally recognized that it would seem to be a work of supererogation to cite authorities to sustain it; *hence the owner of the soil may lay water pipes, gas, or other pipes below the surface; may excavate for a vault or dig for mining purposes, and use it in any other manner that does not interrupt the free passage over it. He retains the full possession of it, subject only to the easement. He may fell the trees upon it, cut the grass, or depasture it.*"

In *Woodring vs. Forks Township* (28 Pa. St., 355), a case involving the right to maintain a mill race across the highway, Lewis, C. J., said (361):

> "A man who owns the soil on which the public have a highway, has a right to enjoy his property in every way that may promote his interest or convenience, so that he takes care not to injure the public easement. *'Sic utere tuo ut alienum non laedas'* is the maxim which applies in such cases. *He may cut a passage across the road for the purpose of draining his land, or leading water to his mill, because the land is his own and he may use it for all legitimate purposes.*"

Chancellor Kent in his *Commentaries on American Law* (III.-433), speaking of the subject now being examined, said:

> "The freehold and all profits belong to the owners of the adjoining lands. *They may carry water in pipes under the highway and have every use and remedy that is consistent with the servitude or easement of a way over it and with police regulations.*"

Jones in his treatise on *Easements* (Secs. 478, 479), speaking of the rights of the abutting owner, says:

> *"He may construct beneath the surface passage ways for water and other purposes, provided he does not interfere with the rights of the public.* He is entitled to every right and profit which can be derived from his land occupied as a highway, consistent with the easement of the public."

Passworth vs. City of Milwaukee (64 Wis., 389), arose over the right of a lot owner to maintain a vault under his sidewalk. The syllabus of the case reads:

> "A lot owner being the owner of the fee to the middle of the street, may construct vaults or other areas, under the sidewalk with openings in the walk if this be done in such a manner as not to interfere with or endanger public travel."

We repeat the language of Judge Elliott, in his work on *Roads and Streets* (Sec. 690) already quoted by us:

> "Subject only to the public easement, the proprietor has all the usual rights and remedies of the owner of a freehold. *He may sink a drain below the surface of the road, if proper care be taken to cover it so that it shall remain safe and convenient. He may carry water in pipes under the way and he may mine under it.*"

These authorities establish the fact that in a rural highway the abutting owner owns the absolute fee in the soil to the middle of the road. The only burden upon his title is the easement of the traveling public. Subject only to this right in the public to pass and repass, he may exercise in the public way all rights of absolute ownership, provided only that his use shall not interfere with the traveling public.

The abutting owner may occupy and excavate portions of the highway temporarily for the purpose of laying pipes.

This principle is supported by the decisions in the following cases:

Clark vs. Fry, 8 Ohio, 358; *Adams vs. Fletcher*, 17 R. I., 137; *Gordon vs. Peltzer*, 56 Mo. App., 603; *Fisher vs. Therkell*, 21 Mich., 1; *Kirkpatrick vs. Knapp*, 28 Mo. App., 427; *Piollet vs. Simmers*, 106 Pa., 95; *City of Allegheny vs. Zimmerman*, 95 Pa., 287; *Perley vs. Chandler*, 6 Mass., 454; *Pemberton vs. Dooley*, 43 Mo. App., 176; *Woodring vs. Forks Township*, 28 Pa., 355; *Passworth vs. Milwaukee*, 64 Wis., 389; *Shelbyville, etc., Turnpike Co. vs. Green*, 99 Ind., 205; 3 *Kent's Commentaries*, 433; *Elliott on Roads and Streets*, 740; *Commissioners of Shawnee Co. vs. Beckwith*, 10 Kan., 607; *Mallory vs. Griffey*, 85 Pa., 277; *Dillon on Municipal Corporations*, Sec. 581; *Starr vs. Camden, etc., R. R. Co.*, 24 N. J. L., 5.

The only restriction is that his excavations or encroachments upon the highway shall not unreasonably interfere with the public travel. Some amount of interference is permitted with the traveling public.

King vs. Norcross, 196 Mass., 369, 374 (1907):

> "The owner of land through which a highway passes has a right to make any reasonable use of it which does not interfere with the enjoyment of the *public easement*, and there are many places in sparsely settled parts of the state where wood might be piled temporarily within the limits of a public highway, without obstructing public travel or interfering with the use of the road for any public purposes."

Sweet vs. Perkins, 196 N. Y., 482, 486 (1909):

"The owner of the land over which a highway has been laid out, still, possesses a right and an interest, which justify him in protecting them against any unlawful trespass by another upon the soil of the highway; or in seeing to the proper maintenance, or adornment, of the wayside; or in doing any act, with respect to it, which is subservient to, and not inconsistent with, ordinary highway uses and purposes. He is, also, entitled to make a temporary use of the highway, if reasonably necessary for the proper utilization and enjoyment of his abutting property; provided that such use in no wise obstructs, or encroaches upon, public rights, or endangers the safety of travelers."

Nelson vs. Ford, 203 Ill., 120, 125 (1903).

In *City of Allegheny vs. Zimmerman* (95 Pa. St., 287), discussing the right of an abutting owner to occupy the surface of the highway, the Supreme Court of Pennsylvania said (293):

"Thus, stone, brick, sand and other materials necessary to be used in building may be placed in a street in the most convenient manner, and suffered to remain for a reasonable time. This may be said to result from necessity in building. *But the right to partially obstruct a street does not appear to be limited to a case of strict necessity, it may extend to purposes of convenience, or ornament, provided it does not unreasonably interfere with public travel.*"

In *Mallory vs. Griffey* (85 Pa., 275, 277), the same Court said:

"The jury were properly instructed that the defendant might place building material on a portion of the highway, and permit the same to remain there for

a reasonable length of time, for the purpose of erecting his barn on the line of road, without, on that account alone, incurring liability for injuries sustained by persons passing along the road: *Provided, ample room was left for the free passage of vehicles and animals;* but he would be liable for injuries occasioned by an unreasonable or negligent use of the highway."

And in the case of *Piollet vs. Simmers* (106 Pa., 95), the same Court in an opinion by Mr. Justice Green, in speaking of the right of the abutting owner to encroach upon the highway, said (108):

"The learned court did not instruct the jury that the defendants had the right to use any part of the highway for the purpose of building and improving their fence, provided they did not interfere with the rights of travelers; and that if the lime tub was calculated to frighten horses, it would be negligence to use it, because all citizens had a right to pass without having their horses frightened by any obstruction placed on the highway. The learned Judge also said that the public had a right to travel over every part of the highway, that everything between the fences was highway, and the public had the right to use any part of it they saw fit. It seems to us this is not a sufficient precise designation of the relative rights of the property owners and the public. *As we understand the law, there is an absolute right in a property owner to use a portion of the public highway for certain purposes for a temporary period and in a reasonable manner, and this right may be exercised in derogation of the right of the traveling public."*

Along the same line is *Shelbyville, etc., Turnpike Co. vs. Green* (99 Ind., 205). There the defendant owning the

land on both sides of the turnpike, built across it a levee to prevent the overflow from the river coming upon his land. This levee crossed the surface of the turnpike at a height of about three feet, and was to some extent an obstruction to travel, yet the Supreme Court of Indiana refused to interfere with its maintenance, saying:

> "A highway is said to be nothing but an easement, comprehending merely the right of the public to pass and repass and to do all acts necessary to keep the highway in repair. This easement does not embrace any interest in the soil; the freehold continues in the owner of the soil, subject to the easement. *Peck vs. Smith*, 1 Conn., 103. The owner retains every right except the easement belonging to the public. *Trustees, etc., vs. Auburn, etc., R. R. Co.*, 3 Hill, 567, and this is the law of Indiana: *Brookville, etc., Co. vs. Butler*, 91 Ind., 134."

In *Commissioners of Shawnee County vs. Beckwith*, (10 Kan., 603), the Court said:

> "In this State the statutes provide for the establishment of public roads and highways, *General Statutes*, 897 Ch., 40, but both the constitution and the statutes are silent as to how much of the land, or what interest therein, shall pass to the public, and how much of the land, or what interest therein, shall remain with the original proprietor. Therefore, we would infer that nothing connected with the land passes to the public except what is actually necessary to make the road a good and sufficient thoroughfare for the public. The public obtains a mere easement to the land. It obtains only so much of the land, soil, trees, etc., as is necessary to make a good road. It obtains the right for persons to pass and repass, and to use the road as a public highway only, and nothing more (*Caulkins vs. Matthews*, 5

Kan., 199-200, and cases there cited). The fee in the land never passes to the public, but always continues to belong to the original owner. He continues to own the trees, the grass, the hedges, the fences, the buildings, the mines, quarries, springs, watercourses, in fact, everything connected with the land over which the road is laid out, which is not necessary for the public to use as a highway. (*Angell on Highways*, Ch. 7, 301 to 312, and cases there cited.) He may remove all these things from the road, or use and enjoy them in any other manner he may choose, so long as he does not interfere with the use of the road as a public highway. No other person has any such rights. In fact, the original owner has as complete and absolute dominion over his land, and over everything connected therewith after the road is laid out upon it, as he had before, except only the easement of the public therein."

In *Dubuque vs. Maloney* (9 Iowa, 450), the city had constructed, in one of its streets, a cistern, one-half of which was within the line of the sidewalk. The defendant erected a building on his lot and in making the excavation for his cellar and foundation wall, and taking the earth from under the sidewalk, he exposed the cistern, its walls burst asunder and it was destroyed. The city, on the theory that the excavation was wrongful, brought an action to recover damages and recovered in the lower Court. On appeal the Supreme Court reversed, saying:

"A street or highway is a public easement, open to the community. * * * A highway is defined to be nothing but an easement, comprehending merely the right of all individuals in the community to pass and repass, with the incidental right of the public to do all acts necessary to keep it in repair. The easement does not comprehend any interest in the soil,

nor give the public legal possession of it; the right of freehold is not touched by establishing a highway, but continues in the original owner of the land, in the same manner as it was before the highway was established, subject to the easement. * * * The public have the right of passing and repassing, and of digging and felling trees for the repair of the road, but subject to this easement the exclusive ownership of the soil—*the freehold and all its profits remain in him who owned the soil before the highway was laid out, and he may maintain trespass or waste, or recover possession, subject to the easement. Jackson vs. Hathaway*, 15 John. 447. In *Perley vs. Chandler*, 6 Mass., 454, the owner of the adjoining ground brought an action of trespass for stopping up a drain under a road, and it was held that he was entitled to the fee of the road, subject to the easement, and might sink a drain, or construct a water course for a mill across the road, beneath the surface, as he owned on both sides; and might maintain trespass for disturbing them. So it is held that the herbage belongs exclusively to the owner of the soil and he may maintain trespass against one who puts his cattle into the highway to graze. So he may against one who builds upon or otherwise obstructs a highway; or who instead of passing along it remains standing upon it, as a strolling musician, refusing to depart."

This language was used of a city street. How much more applicable is it to a country road, where the rights of the public are still less and those of the abutting owner correspondingly greater?

The same doctrine was held by the Supreme Court of Michigan in the case of *Fisher vs. Thirkell* (24 Mich., 1),

where the abutting owner had excavated under the sidewalk in front of his property. The opinion reads:

> "We are satisfied that at common law, the making of such an excavation under the sidewalks in cities, and the scuttles therein, for such purpose as this was made and used for, were not treated as nuisances in themselves or in any respect illegal, unless the walk was allowed to remain broken for an unreasonable length of time, or the work was improperly or unsafely constructed, though it would always become a nuisance if not kept in repair."

No license to open a highway is needed by an abutting owner, unless required by a reasonable police regulation.

In *Gordon vs. Peltzer* (56 Mo. App., 603), another excavation case, Gill, J., said:

> "It seems to be contended on behalf of the plaintiff that until the abutting property owner shall secure a legislative permit, it is unlawful to excavate under the sidewalk and place there a coal hole, even though it may be done in a careful manner, and left reasonably safe for passing pedestrians. Counsel apparently gathered encouragement for this position, because of the fact that under the charter of Kansas City (as it existed when this vault and coal hole was constructed) power was given the common councils by ordinance 'to have exclusive control and power on the streets, sidewalks, * * * and highways of the city * * * and to regulate the building of vaults under the sidewalks (Laws of 1875 p. 204), and because the city had not then exercised the power—had not by ordinance provided any rules and regulations for building vaults. The contention is, that as there was an absence of ordinance under the

grant of power, then the construction of such vault and coal hole was without lawful authority and its erection a nuisance. Though this position has apparent support in some jurisdictions, particularly in New York (*Con-Crere vs. Smith,* 18 N. Y., 79), we yet think that it is not the better law. We regard it the better doctrine that the want of a special license or authority to construct and maintain the coal hole in question did not constitute it a nuisance."

In *Clark vs. Fry* (8 Ohio State, 358), the plaintiff in error excavated in the street opposite his property abutting thereon. Into this excavation so made by him the defendant in error had fallen and suffered injury, for which he brought an action and recovered a judgment. The City of Toledo, where the accident happened, had prior thereto passed an ordinance imposing a penalty for obstructing streets and highways. On appeal to the Supreme Court the judgment was reversed, Bartley, J., saying:

"The first inquiry presented in the determination of this case is whether the excavation extending into the street, in front of the lot of the plaintiff in error, was in itself unlawful, even although guarded by a sufficient fence. The District Court instructed the jury 'that, as the defendant had shown no license from the authorities of the City of Toledo, or the State of Ohio, to make such an excavation in the street, the same was unlawful; and being unlawful the defendant, Clark, was liable for any damage which occurred by reason thereof to the plaintiff, if the latter was not himself in fault.' Did the District Court err in giving this instruction? The right of the public in the use of a highway is the right of transit to every person who has occasion so to use it. This right is, however, subject to such incidental and

temporary or partial obstructions as manifest necessity may require. Even the use of a highway for mere transit by one part of the public may, at the time of a multitude upon it, oppose a temporary obstruction to the passage of another part of the public. A company of persons stopping and standing on the pavement of a street or persons stopping in the street with their wagons or carriages for mere temporary purposes of business, interpose impediments to the free and uninterrupted transit upon a public highway. The delivery of freight and every variety of goods, fuel, etc., at business and other houses on a street, is a necessary incident to the use of the public highway. And the repair or improvement of streets and the deposit of the materials for the same, often create obstructions to the uninterrupted transit by the public. So, also the improvement or building or repair of houses, and the construction of sewers and cellar drains on adjacent lands, often create necessary temporary impediments upon public highways. These are not invasions of, but simply incident to, or rather qualifications of, the right of transit; the limitation upon them is that they must not be unnecessarily and unreasonably interposed or prolonged."

NATURAL GAS PIPE LINES BENEATH RURAL HIGHWAYS.

The foregoing authorities, we think, are conclusive of the case at bar; but it may be said that we have not produced a case of a natural gas pipe line beneath country roads.

We now call the Court's attention to the case of *Board of Commissioners of Hamilton County vs. Indianapolis Gas Company,* 134 Ind., 209.

On August 4, 1887, the Board of Commissioners of Hamilton County, Indiana, had granted to the appellee authority to lay gas lines in the roads of the county. At the time this permission was granted, no authority existed in the Board to grant it. On February 20, 1889, authority to grant such permission was expressly conferred by the Legislature of the State. On November 2, 1889, the Board attempted to revoke its permission given almost two years before. On November 25, 1889, the Board filed its bill asking the enjoining of the Gas Company from using the highways for its pipe lines, on the ground that the Company was acting without an order from the Board, pursuant to the law of February 20, 1889. The lower court refused the injunction. The supreme court affirmed its judgment.

The supreme court held that the order of the Board granting permission, even if it had no authority to grant it, was voidable merely, not void, and that no good reason had been shown them why it should be cancelled. The court construed the statute requiring permission to lay gas pipes, and held its purpose was merely to protect the surface of the highway for the public, and that the right or easement to lay the

pipes beneath the surface of the highway must be purchased from the abutting owner.

The Supreme Court said:

"The owners of lands abutting a highway are presumptively the owners in fee to the center of such highway, and such fee includes all rights not inconsistent with the easement of the public for the purposes of travel. *Kincaid vs. Indiana Natural Gas Company, supra,* [124 Ind., 577]; *Lostutter vs. City of Aurora,* 126 Ind., 436; *Shelbyville, etc., Turnpike Co. vs. Green,* 99 Ind., 205; *Cox vs. Louisville, etc., R. R. Co.,* 48 Ind., 178; *Burkham vs. Ohio, etc., R. R. Co., supra,* [122 Ind., 344].

"Where the easement consists in the right to flood the land of another, such other possesses all rights in the land, the water, the timber, the ice, etc., not inconsistent with such easement. *Edgerton vs. Huff,* 26 Ind., 35; *State vs. Pottmeyer,* 33 Ind., 402; *Julien vs. Woodsmall,* 82 Ind., 568; *Brookville, etc., Co. vs. Butler,* 91 Ind., 134. In the last case cited, the rule as applied to riparian proprietors was held to apply to the owner of land adjoining a public highway, and we can see no reason for distinguishing the one class of cases from the other.

"In *Shelbyville, etc., Co. vs. Green, supra,* the owner of the fee was held to possess the power to construct a levee across a turnpike for the protection of his lands against the overflow of a watercourse. In the opinion in that case it is said: 'A highway is said to be nothing but an easement comprehending merely the right to pass and repass, and to do all acts necessary to keep the highway in repair. This easement does not embrace any interest in the soil; the freehold continues in the owner of the soil subject to the easement.

Peck vs. Smith, 1 Conn., 103. The owner retains every right except the easement belonging to the public. *Trustee, etc., vs. Auburn, etc., R. R. Co.,* 3 Hill, 567. And this is the law of Indiana. *Brookville, etc., Co. vs. Butler,* 91 Ind., 134.'

"With these established principles, landowners, in the absence of legislation to the contrary, hold the right to permit the incumbrance of the fee with an easement, in addition to that of the public to pass and repass, upon a highway. This right is only restricted by the right of the public to preserve the easement from injury.

"The enactment of February 20, 1889, as we have said, cannot be regarded as enlarging the interest of the public in highways, nor as diminishing the rights of the fee-owner in the soil. It does not appear, in this case, that the rights of the public were being invaded by the appellee; no proof was made that the appellee was threatening an injury to the easement, or was asserting a right inconsistent with the rights of the public.

"The action of the Court below seems to be fully sustained.

"The judgment is affirmed."

This case is most pertinent. Indiana had granted to the county commissioners authority to permit gas companies to lay their lines in the country roads. Yet the supreme court of that state expressly held that such legislative grant could not be regarded "as enlarging the interest of the public in the highway, nor as diminishing the rights of the fee owners in the soil." As well might the state grant to abutting owners the right to dig for and sink drains or water pipes across or along the public highways in front of their properties. Such grant would not increase the rights of the abutters. The right to so dig and sink was vested in them

before the establishment of the road. At its creation such right passed not to the public, as in urban streets, but remained in the abutting owners. Therefore, the public could not grant them what it never had, but what was already in them.

But the Indiana case holds more. It declares the right of the abutting owners to incumber the land with another easement in addition to that of the public to pass and repass. The abutting owners may, therefore, grant an easement in the public roads to lay and maintain therein a pipe line. If this is done without molesting the traveling public of any of its rights, they may legally do so. The abutters have, for full value received, sold and granted to the appellee rights of way, easements across the road, upon which to lay his lines.

See to same effect:

Kansas vs. Kansas Nat. Gas Co., 71 Kansas, 508.

The laying of gas pipe lines beneath the highway is sanctioned by custom.

Another and further reason may be assigned why the appellee may lay its lines beneath the public highways. It is the universal custom in gas fields to do so.

In *Palmer vs. Silverthorn*, 32 Pa., 65, the Supreme Court of Pennsylvania, speaking of the right of the abutting

property owner to place building material in the public highway, said (69):

> "The necessity of the case was probably the foundation of the rule and is the foundation of most laws and municipal regulations; *but the practice has become a custom of such long standing, that it is regarded as law*, and the right will not be defeated by an investigation into the necessity of so doing in any particular case. It is a right to be exercised, under responsibility for all injury arising from an unreasonable or negligent use of it."

In *O'Linda vs. Lathrop*, 38 Mass., 297, Morton, J., said:

> "The use of the way by the defendant, which is complained of, consisted in placing gates and doors so near the street that, when opened, they swung over it: in suffering horses and carriages occasionally to stand in the street near his premises; in placing timber and other materials on the street preparatory to building a barn on his own land; in throwing earth out of his cellar onto the street for the purpose of removing it; and in spreading some earth on the street to make it more level and to make his own barn more accessible. This is alleged to be an unreasonable use of the way and such a one as amounts to a trespass. *What may be deemed a reasonable and proper use of a way, public or private, must depend much on the local situation and much on public usage. The general use and the acquiescence of the public, is evidence of the right. The owner of land may make such reasonable use of a way adjoining his land as is usually made by others similarly situated.*"

Smith vs. Simmons, 103 Pa. St., 32.

From these authorities we conclude that the law of Oklahoma permitting the laying of gas lines over and across a public highway is shown by the customs and usages of the people in relation thereto, the use made and the acquiescence of the public therein. For over four years natural gas has been produced and used in the state. During this time gas companies have freely laid their lines over public roads. The present extent of this use is shown by the fact that over five hundred miles of transporting gas lines are now so maintained in the state. Many of them over and along roads for great distances.

It is not true, as the Attorney General argues, that the appellees propose to lay their lines longitudinally along the rural highways of the state.

The appellees will *not* lay their lines longitudinally along the public highways. This appears from the fifteenth paragraph of the bill of the Kansas Natural Gas Company (Record, page 7), not denied, and therefore admitted by the Attorney General in his answer (Record, page 112):

> "That the line which your orator proposes to construct will not be laid by him along any public road or highway in the state of Oklahoma, but must necessarily be laid over and across certain public roads and highways in the line of its route, but that wherever the

said line is laid across any such highway or road your orator proposes to and will lay the same at such depth and in such a manner as not to interfere with or endanger or incommode the public travel, and in the same identical manner as natural gas lines are now laid, maintained and operated over the public roads and highways of the state and in every instance in exact compliance with the requirements of the laws or officials of the state of Oklahoma laid down or formulated for the laying of lines used within the state."

This allegation is repeated in the bills of the two other complainants (Record, pp. 39, 74), and the same admission is made in the answer of the Attorney General to the same (Record, pp. 120, 129).

REVIEW OF CASES RELIED UPON BY APPELLANT AS TO CROSSING HIGHWAYS.

The Attorney General relies upon the case of *State of Kansas vs. Kansas Natural Gas, etc., Co.*, 71 Kan., 508, as an authority that the rights of way, which we have secured from abutting property owners, confer upon us no authority to lay our lines beneath and across the public ways. The case does not so decide. In the first place that was a case of a gas line not *crossing* the public roads, but occupying them lengthwise, and, secondly, even as to such a longitudinal use the court held it could lawfully be made. The syllabus of the case, written by the court itself, reads as follows:

> "As against the state, a natural gas company incorporated under the laws of Kansas for the purpose of transporting and distributing natural gas for fuel, light and power, may bury its pipe line in the public highway, where such use does not inconvenience, endanger or obstruct public travel."

But, says the Attorney General, the court, notwithstanding its decision in the case, used the following language supporting his contention:

> "The right of the gas company to bury its pipes in the public highway for the transportation and distribution of gas depends largely upon the effect such use would have on the subsequent use of the highways as a thoroughfare for public travel. It may be said that the gas company could not, and did not, as against the state, obtain from the abutting fee-owners any right to use the public highway for any purpose. Its use be-

longs to the public and not to the owners of adjoining property. It is true that there are some privileges which such an owner may exercise for the betterment of the adjacent estate, but he has no power to transfer to another any right to occupy the highway for any purpose."

The first sentence of this excerpt declares that the use which may be made of highways depends largely upon its effect upon the subsequent use of the way as a thoroughfare. In the case at bar the sunken pipe line will have no effect whatever upon the roads. It is laid below reach of wheel or foot, the passerby not even knowing the lines are in existence.

But what did the court mean by the remainder of the above extract? Shortly before it was decided, the court had handed down a decision in the case of *McCann vs. Telephone Co.* (69 Kan., 210), in which, although badly divided, it arrayed itself with those courts which hold that a fixed immobile plant in the highway is, when used for the transmission of messages, a method of travel within the original intent of those who dedicated the road for public use. Having some fears that the court might not extend this doctrine to gas lines, our clients had secured from the abutting property owners rights of way in the highway, and the case was presented upon the doctrine of the *McCann* case, and also, as a matter of precaution, upon these rights of way. The court, therefore, used the above language in reply to our argument that the abutting owner could grant us a public right in the highway. This, of course, could not be done if the rule of action laid down in the *McCann case* was applied to gas lines, for then the public use of a highway—the laying therein lengthwise of a gas line—had passed from the abutting owner to the public and the owner could grant or convey *nothing*. The *Kansas Natural Gas case* was rightly decided, for if telephone and telegraph lines with their fixed and stable poles, which stand a constant

menace and physical obstruction to the ordinary use of the highway, are a species of travel and communication and among the original purposes of the highway, as the Kansas Court held, it must most properly and logically follow that a pipe line is so, and infinitely more so, for the pipes buried under three feet of earth and far from reach of either foot or wheel, present no impediment whatever to the traveling public and lie there harmless and noiseless, performing their labor and service to the world, wholly unknown to the traveler passing above. The case, however, has no application to the one at bar, which is one not of public use of the road longitudinally, but of a private crossing underneath the public easement.

If the law of Oklahoma does not follow that of Kansas and the courts of Oklahoma hold that gas lines are not among the common uses of a rural highway, then the converse of the doctrine laid down by the Kansas supreme court must necessarily follow in Oklahoma, and if it be there held that the right to lay lines in public roads is not in the public but in the abutting property owner, a grant of a right of way from him gives us complete *right underneath the public easement.*

Another case relied upon by the Attorney General is,—

St. Louis vs. Western Union Telegraph Co., 148 U. S., 92:

In this case the City of St. Louis imposed upon the Telegraph Company an annual charge of five dollars for every pole erected in its streets.

The facts of this case differ from the case at bar in several respects. The telegraph company occupied *longitudinally* streets of a *municipality*, whereas, in our case, the gas companies seek merely to *cross* the line of a *rural highway* at the depth of three feet below the surface.

The Supreme Court upheld the ordinance on the ground that it did not impose a tax upon interstate commerce, but merely exacted compensation in the form of rental for the exclusive occupation and use which the telegraph company made of a portion of the surface of the streets.

In the opinion of the court, Mr. Justice Miller said:

"That this is not a tax upon the property of the corporation, or upon its business, or for the privilege of doing business, is thus disclosed by the very terms of the section. The city has attempted to make the telegraph company pay for appropriating to its own and sole use a part of the streets and public places of the city. It is seeking to collect rent. (98).

"* * * the use made by the telegraph company is, in respect to so much of the space as it occupies with its poles, permanent and exclusive. It as effectually and permanently dispossesses the general public as if it had destroyed that amount of ground. Whatever benefit the public may receive in the way of transportation of messages, that space is, so far as respects its actual use for purposes of a highway and personal travel, wholly lost to the public. By sufficient multiplication of telegraph and telephone companies the whole space of the highway might be occupied, and that which was designed for general use for purposes of travel entirely appropriated to the separate use of companies and for the transportation of messages. (99).

"* * * * All that we desire or need to notice is the fact that this use is an absolute, permanent and exclusive appropriation of that space in the streets which is occupied by the telegraph poles. To that extent it is a use different in kind and extent from that enjoyed by the general public. Now, when there is this permant and exclusive appropriation of a part of the highway, is there in the nature of things anything to inhibit the public from exacting rental for the space thus occupied? Obviously not. Suppose a municipality permits one to occupy space in a public park, for the erection of a booth in which to sell fruit and other articles; who would question the right of the city to charge for the use of the ground thus occupied, or call such charge a tax, or anything else except rental? So, in like manner, while permission to a telegraph company to occupy the streets is not technically a lease, and does not in terms create the relation of landlord and tenant, yet it is the giving of the exclusive use of real estate, for which the giver has a right to exact compensation, which is in the nature of rental." (99).

In the conclusion of the opinion Mr. Justice Miller announced a principle directly in accord with our position that a state cannot exclude a corporation engaged in interstate commerce from crossing or entering upon highways when necessary for the purpose of carrying on its interstate business.

The learned Justice said:

"Indeed, it may be observed, in the line of the thoughts heretofore expressed, that this charge is one in the nature of rental; that the occupation by this interstate commerce company of the streets cannot be denied

by the city; that all that it can insist upon is, in this respect, reasonable compensation for the space in the streets thus exclusively appropriated; and it follows in the nature of things that it does not lie exclusively in its power to determine what is reasonable rental." (pp. 104-105).

The Attorney General also relies upon,—

Northwestern Telephone Exchange Co. vs. City of St. Charles, 154 Fed., 386:

An ordinance of the city prohibited a telephone company from erecting poles or wires in any of the public streets unless authorized by ordinance to do so. The plaintiff company had erected poles and wires and established an exchange within the city and its right to operate the same in connection with its long distance line was not denied. The company, however, desired to erect poles and wires on some other streets longitudinally and to establish an additional local exchange which would connect with its long distance line, and filed a bill to enjoin the city authorities from attempting to enforce the ordinance requiring it to obtain permission to use the streets.

Judge Lochren held that the ordinance was valid and dismissed the bill.

It is apparent that the foregoing decisions rested upon different facts and were governed by different considerations than the case at bar. In our case the plaintiff com-

panies have acquired or intend to acquire the rights of way by purchase from private owners for the entire length of their proposed pipe line. They do not intend to lay pipes along or beneath the highways longitudinally or to occupy any portion of the surface of a highway as is done by telephone and telegraph poles. They desire simply to lay their pipes across the line of the highway at a distance of three feet below the surface. They obtain from the land owner an easement which authorizes them to lay their pipes in the land of the grantor, including that portion of the land over which the highway passes. There is no inconsistency between the exercise of this easement of laying pipes three feet below the surface of the highway and the exercise by the public of its easement of a right of way over the highway.

The appellant also relies upon *Lewis on Eminent Domain*, Section 910; *Elliott on Roads and Streets*, Sections 312, 313; *Keasbey on Electric Wires*, Sections 103, 109. These and other like authorities lay down no different doctrine than that for which we contend. The whole burden of these authorities is directed to the question of whether, when the limits of a city are extended and new streets laid out in the added portions thereof, the right of the abutter upon what was formerly rural highways is or is not, without else being done or compensation rendered, reduced to that of abutters upon urban highways. No such question confronts us here. There is before the court no case of extension of city limits. Neither is there or will there be any attempt to lay the lines of the appellee into any city in Oklahoma, no one of which will he either enter or approach. His line will cross only rural highways.

But, says the attorney general, whatever rights an abutting owner has in the public highway to drains and sewers,

lay water and gas lines and construct underground or overhead passages, is the mere right of access from his land on one side of the way to that lying on the other. As we have heretofore attempted to show, this is not a correct statement of the law and that all the estate which the public enjoys in a rural road is a mere right of passage to and fro over it, while the abutter owns the entire fee thereof burdened only with the public right of passage or easement.

Counsel for appellant argues that even if the landowner has the right to lay a pipe line beneath and across a highway, he cannot grant or assign this right to another. But this reasoning ignores the true nature of the two rights or easements in the land. The public have an easement of right of way for the purpose of travel over the surface of the highway. The gas company has an easement to lay pipes beneath the surface and across the line of the highway. An owner of land may create and grant an easement to exercise any other right which is not inconsistent with prior easements. Even if the public have a right of way over the portion of his land designated by the Act of Congress as a highway, still the grant of a right to lay pipes beneath the surface of any portion of his land, including that occupied by the highway, is not inconsistent with the easement of the public, nor does it interfere in the least with its enjoyment.

The landowner has the same power to grant an easement to lay pipes beneath the highway as to grant an easement to lay pipes beneath any other portion of the area owned by him, so long as the exercise of the right to lay pipes does not interfere with the enjoyment of the highway by the public. The landowner does not grant, and the gas company does not receive, an easement to lay pipes beneath the highway *as such*. What is granted, is the right to lay pipes beneath the surface of the land which the grantor owns, in-

cluding that portion of the land over which the public have their right of way. The rights of the public are not such as to be interfered with in the least by the laying of pipes across the highway beneath its surface, and the grant of the abutting owner is, therefore, valid and sufficient to authorize the same.

THE APPELLEES REQUIRE FROM THE STATE OF OKLAHOMA NO FRANCHISE TO LAY AND MAINTAIN PIPE LINES ALONG THE RIGHT OF WAY ACQUIRED BY PURCHASE FROM THE OWNERS OF THE LAND TRAVERSED.

The nature of the business which the appellees propose to conduct in Oklahoma and which they sought in this proceeding to protect from acts of interference by the defendants, is averred in the bills and answers to be as follows:

> "It is also the purpose and determination of your orator to extend its said trunk pipe further into the state of Oklahoma and lay branch or gathering lines therefrom as fast as it can acquire rights of way and make contracts for the sale and delivery to it of natural gas from the owners of gas wells therein, the said gas in every instance to be delivered to it at the mouth of the well. Your orator further avers and declares that its said pipe line will be used by it wholly and solely for the transportation and carriage of natural gas from gas wells in the state of Oklahoma into the state of Kansas, and not in any way for local traffic in the state of Oklahoma, and that your orator will conduct and carry on no local traffic in the state of Okla-

homa and that your orator will conduct and carry on no local traffic or business of any nature whatsoever within the state of Oklahoma." (Rec. 6).

The manner in which it is proposed to cross the highways is averred to be as follows:

"The line which your orator proposes to construct will not be laid by it along any public highway in the state of Oklahoma, but must necessarily be laid over and across certain highways in the line of its route, but wherever the said line is laid across any public highway, your orator proposes to and will lay the same at such a depth and in such a manner as not in any way to interfere with or endanger or incommode the public travel, and in the same and identical manner as natural gas lines are now laid, maintained and operated over the public highways of the state." (Rec. 7).

Adherence to these pleadings will eliminate many of the arguments upon which appellant most strongly relies. From these averments it conclusively appears that:

(1) The appellee gas companies do not propose to engage in the business of *producing* natural gas, either as owners or lessees of wells. They will contract with the owner or lessee of the gas wells for the purchase of his output, and will connect his pipe leading from the well owned by him with its own trunk or branch lines and transport the gas which flows by natural pressure into their mains, of the state of Oklahoma.

(2) The appellees will not carry on any local business of selling gas within the state of Oklahoma. Their business will be interstate commerce exclusively.

(3) The appellees will not undertake to supply natural gas to the public of Oklahoma, or do any act which might amount to the exercise of a public function whatsoever.

(4) The appellees will not enter any municipality or seek to lay their pipes either along or across municipal streets.

(5) The appellees will not lay pipes longitudinally in the highways, but will lay the same across the line of the highways at a depth of three feet below the surface.

(6) The appellees claim no power of eminent domain, and do not rely in any sense upon or seek to use the right of the public in its highways for an easement or right to lay pipes; they will in every instance purchase a private right of way across and beneath the highway from the abutting owners on each side.

From the nature of the business, as above analyzed, which the appellees propose to conduct in Oklahoma, it follows that the state cannot require the obtaining of any franchises or license for the doing of the same, and this for two reasons:

1st. The purchase of natural gas and its transportation out of the state through pipe lines along privately purchased rights of way is interstate commerce, pure and simple. As we have seen, *supra*, pp. 47, 96, the right to engage in interstate commerce and to employ the instrumentalities, such as pipe lines, necessary to the exercise of such right, is guaranteed by the Federal Constitution; this right is not obtained from the state and cannot be denied by the state. Further, as was expressly ruled in *Crutcher vs. Ken-*

tucky, 141 U. S., 47, 57, *supra,* page 47, individuals do not lose this constitutional right by reason of the fact that instead of buying and transporting natural gas as individuals, they organize and conduct such business under a corporation having corporate power to transact the same;

2nd. The business of the appellees is not within the class for which a state can require the obtaining of a franchise. It is not public in character, or within the definition of businesses requiring a franchise as stated by Mr. Justice Bradley in the case of—

California vs. Pacific Railroad Company, 127 U. S., 1, 40:

> " * * * a franchise is a right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security."

These gas companies do not propose to supply gas to the people of Oklahoma, or to collect tolls therefor, or to exercise any "privilege or power of public concern;" they will lay their pipe lines along a private right of way, purchased and owned by them in a private capacity, and transport the gas owned by them through the same as any private individual might do.

It has always been lawful for an individual or corporation to maintain a private railroad, or telegraph line, or pipe line upon private lands owned by them, or over a right of way acquired by private purchase from the owner of the land traversed. Such an arrangement involves the

exercise of no public function and requires no grant of a special franchise from the Government.

Wade vs. Lutcher & Moore Cypress Lumber Co., 74 Fed., 517, 521;

Hudspeth vs. Hall, 111 Ga., 510, 516-517;

M'Phee & M'Ginnity Co. vs. Union Pacific R. Co., 158 Fed., 5, 10-11; *infra;*

Pensacola Telegraph Co. vs. Western Union Telegraph Co., 96 U. S., 1.

The right of laying pipe lines beneath and across highways has never been treated as a public right or requiring a franchise from the State for its exercise, but under the common law has always been enjoyed by the abutting owners. It is not a use of the highway *as a highway*, or in the sense in which the public use the highway. It is a right incident to the ownership of the abutting land which the owner has never parted with. The abutting owner owns the fee to the land adjacent to and beneath the highway, and included in his ownership is the right to lay pipes beneath the surface of any portion of his land, including that covered by the highway, and to grant to another an easement to do the acts which he as owner might do. The act of crossing is rendered necessary by the very existence of the highway which, unless the right of crossing existed, would deprive the abutting owner and his grantee of the enjoyment of their full rights in the land.

(Authorities *supra*, pp. 114 to 139; 148 to 149.)

Even the right to lay tracks upon and occupy a portion of the surface of a street or to lay pipes beneath the surface, when granted by a municipality, is an easement and not a franchise.

This distinction is very clearly drawn by Judge Sanborn in the case of—

M'Phee & M'Ginnity Co. vs. Union Pacific R. Co., 158 Fed. 5, 10-11.

Speaking of a grant to a railroad company of a right to occupy the streets of the City of Denver, Judge Sanborn said:

> "A right or privilege which is essential to the performance of the general function or purpose of the grantee, and which is and can be granted by the sovereignty alone, such as the right or privilege of a corporation to operate an ordinary or commercial railroad, a street railroad, city waterworks or gas works, and to collect tolls therefor, is a franchise * * *
>
> "A right or privilege not essential to the general function or purpose of the grantee, and *of such a nature that a private party might grant a like right or privilege upon his property*, such as a temporary or revocable permission to occupy or use a portion of some public ground, highway, or street, is a license and not a franchise. A privilege of the latter character, such as a permission to lay and operate a railroad across or for a short distance upon a public street, is a grant of an easement or right of way. *An easement or right of way is not necessarily a creation of or a grant by the sovereignty. A private citizen may confer it over his own land*, and the permission by a city to exercise such a privilege on one of its streets is of even less efficacy than such a private grant, because it is subject to the rights of the abutting owners, while the private owner's grant confers the perfect right of way over his property."

Other authorities to the effect that these rights to use municipal streets are easements and not franchises, are:

Mayor, etc., of Knoxville vs. Africa, 77 Fed., 501, 507;
People vs. Gas Light Company, 38 Mich. 154;
People vs. Fort Wayne, etc., Ry. Co., 92 Mich. 522, 525;
Railroad Company vs. People, 73 Ill. 541;
Power Company vs. Tacoma, 20 Wash. 288;
Chicago Municipal Gas Light Co. vs. Town of Lake, 130 Ill. 42, 53-54.
Belleville vs. Citizens' Horse R. Co., 152 Ill. 171, 26 L. R. A. 681, 685;
Lincoln Street R. Co. vs. City of Lincoln, 61 Neb. 109, 126;
III Abbott on Municipal Corporations, 896;
I Elliott on Railroads, Sec. 65; III ib. sec. 1079.

The decisions last cited are concerned with streets in municipalities, and arise in the class of cases in which it is held that the right of a municipality in its streets includes the right to use the streets for certain public utilities, such as maintaining tracks for street railways upon the surface, or laying pipes for water or gas beneath the same. As these rights belong to the municipality as part of or as incident to its interest in the streets, the right to use the streets for such purposes must be obtained by grant of the necessary easement from the municipal authorities.

The right so granted is held to be an easement in real property and not a franchise of the State.

THE QUESTION OF CONSERVATION.

As has already been shown the question of conservation does not properly or at all arise in this case. Chapter 67 of the Laws of Oklahoma contains no provision prohibiting waste or excessive use of natural gas; it does not impose any restrictions upon the right of the owner except that he may not transport it out of the state—*i. e.*, introduce it into interstate commerce. For anything that appears in the statute, the land owner may remove the cap from his well and allow the entire pool of gas which it taps—the gas under both his own and adjoining lands—to exhaust into the open air. One cannot read Chapter 67 without arriving at the conclusion that the sole purpose of its provisions is to prohibit—destroy—interstate commerce in natural gas.

But we are not unwilling to discuss the question of conservation.

Our first inquiry is as to the nature and extent of the title which individuals acquire in the commodity involved in this suit—natural gas.

NATURAL GAS IS NOT THE PROPERTY OF THE STATE.

We are not here dealing with *public property*—property which is owned by the state or by the people of the state as a whole, and in which the individual citizen possesses no separate right of ownership, but merely a right in common

with all other citizens to use or appropriate. To this class of property belong the air, the waters of public streams, and the game.

The title to such property is in the people of the state. The state can confine such property within whatever bounds it chooses. It can absolutely deny all right of private ownership in such property. Consequently, if the state allow such property to pass into the domain of private ownership at all, it can qualify such ownership by whatever limitations it chooses to impose. It can restrict the right of the individual to a mere right of use or consumption within the boundaries of the state. (See the opinion of Mr. Justice White in *Ohio Oil Co. vs. Indiana*, 177 U. S., 190, *infra*, p. 174).

But in this case we are concerned with a lawful article of private property, which is the subject of exclusive ownership by an individual. The state of Oklahoma never owned this natural gas. The titles to the lands in question were derived through the Land Department of the United States before the territory of Oklahoma was admitted as a state. The individuals who took title to the lands became, as against the public, the exclusive owners of the natural gas deposited therein. There were no restrictions or reservations as to the right to the gas imposed in the grants of the lands.

BY THE GREAT WEIGHT OF AUTHORITY IN THE UNITED STATES, AN OWNER OF LAND HAS, NOT MERELY THE RIGHT TO REDUCE TO POSSESSION, BUT THE ACTUAL TITLE, TO THE NATURAL GAS IN HIS LANDS, SO LONG AS THE GAS DOES NOT ESCAPE INTO THE LANDS OF OTHER OWNERS.

The effect of the decisions is that the landowner may use or sell the natural gas which flows from wells in his lands until the supply is exhausted.

In *Brown vs. Spilman*, 155 U. S., 665, 669, Mr. Justice Shiras said:

> "Petroleum gas and oil are substances of a peculiar character, and decisions in ordinary cases of mining, for coal and other minerals which have a fixed *situs*, cannot be applied to contracts concerning them without some qualifications. *They belong to the owner of the land, and are part of it*, so long as they are on it or in it, or subject to his control, but when they escape and go into other land, or come under another's control, the title of the former owner is gone. If an adjoining owner drills his own land and taps a deposit of oil or gas, extending under his neighbor's field, so that it comes into his well, it becomes his property. *Brown vs. Vandergrift*, 80 Penn. St., 142, 147; *Westmoreland Nat. Gas Co.'s Appeal*, 25 Weekly Notes of Cases, (Penn.), 103."

Oil and gas do not differ in respect of the rights of the public from coal, iron ore and other like substances; they are property when in place and when reduced to possession; they may be sold even while in place and like coal, iron ore and other minerals, and two distinct estates may be created by the owner, both in absolute fee simple, one in the oil and gas in place and the other in the surface and remainder of the earth, in the same manner precisely as title is sometimes acquired by one man in the veins and deposits of coal, limestone, iron ore, lead, zinc and all other like solid substances separate and apart from the remainder of the soil or earth. We submit the correctness of all this is shown conclusively by the following authorities: *Thornton on Oil and Gas*, Sections 18, 19, 20; *White on Mines and Mining Remedies, Section* 162, p. 223; *Snyder on Mines*, Section 1170, p. 954; *Funk vs. Haldeman*, 53 Pa., 248; *Stoughton's Appeal*, 88 Pa., 198; *Blakeley vs. Marshall*, 174 Pa., 429; *Gill vs. Weston*, 110 Pa., 312; *Gas Co. vs. DeWitt*, 130 Pa., 235; *Chartiers Block Coal Co. vs. Mellon*, 152 Pa., 286; *Hague vs. Wheeler*, 157 Pa., 324; *Murray vs. Allred*, 100 Tenn., 100; *Moore vs. Griffin*, 72 Kansas, 164; *Isom vs. Rex Crude Oil Co.*, 147 Cal., 659; *Ontario Natural Gas Co. vs. Smart*, 19 Ont. Rep., 591; *Ontario Natural Gas Co. vs. Gossfield*, 18 Ont. App., 666; *Hughes vs. Pipe Lines*, 119 N. Y., 423; *Williamson vs. Jones*, 39 W. Va., 231; *South Penn Oil Co. vs. McIntire*, 44 W. Va., 296; *Carter vs. Tyler County Court*, 45 W. Va., 806; *Williamson vs. Jones*, 43 W. Va., 562; *Wilson vs. Youst*, 43 W. Va., 826; *Preston vs. White*, 57 W. Va., 278; *Ketley vs. Ohio Oil Co.*, 57 Ohio, 317; *Gas Co. vs. Ullery*, 68 Ohio, 259; *Nonemaker vs. Amos*, 73 Ohio, 163; *Hail vs. Reed*, 15 B. Mon., 479; *Brown vs. Spillman*, 155 U. S., 665.

To save the court the labor of examining these authorities we have collated and printed the salient portions thereof bearing upon this proposition.

Snyder, in his work on *Mines,* Sec. 1170, p. 954, speaking of the nature of oil and gas, says:

> "It is well settled that oil and gas *in situ* are both minerals and a part of the soil, in many respects the general doctrines of mining leases will apply to them."

And on page 958 the author, still speaking upon the same subject, again says:

> "Oil is different from water in one sense and identical with it in another. The water taken from the spring of another, for instance, when severed becomes the exclusive property of the person taking, assuming that the taking is in consequence of a license, express or implied. Not so with oil. It has a distinctive value different from that of water; and even though it may be severed from the freehold, that is, drawn from the well or pipe, it is still the property of the owner of the soil from which it is taken until he shall have parted with the title. This, of course, upon the principle that it is drawn from his land against his will or surreptitiously. It is otherwise when it is taken pursuant to a license or lease by the terms of which the ownership is to pass to the lessee or licensee on payment of the rent or royalty."

White in his work on *Mines and Mining Remedies*, (Sec. 162, p. 223) says:

> "So long as mineral oil and gas remain in the natural condition in which such minerals are found, in the earth or rock, they are regarded the same as other mineral in place; form a part of the corpus estate of the land owner and would be included as within the meaning of the term 'land.' The property rights of the land owner to the mineral oil and gas in his land are recognized by the courts to the same extent as the property in the solid minerals in place. And where the title to the oil and gas has been severed from the title to the land, the land owner would be entitled to the possession of such mineral as an incident to his ownership, although it would require a penetration of the underlying minerals of another owner in order to reach the oil or gas."

Thornton in his work on *Oil and Gas*, pp. 18, 19 and 20, says:

> "Whatever may have been thought of oil or natural gas at one time, it is now established beyond any question that oil or petroleum and natural gas are minerals, and judicially must be so treated. * * * Oil and gas, until severed from the realty, are so much a part of it as coal or stone. So long as they remain in the ground, outside of an artificial receptacle at least, as the casing of a well or pipe line, they must be treated as a part of the realty underneath the surface of which they lie. * * * The owner of the surface is the owner of the gas and oil beneath it; but if they escape into the land of another he ceases to be the owner of them. They are the subject of grant or conveyance,

just as much so as the grant or conveyance of coal or stone buried in the soil of the same tract of land."

The first, and one of the most interesting cases in which this question now before this court was raised and examined, arose in the courts of the state of Kentucky in 1854, five years before the drilling of the celebrated Drake well on Oil Creek in Northwestern Pennsylvania, the well which started the oil industry, now grown to such enormous proportions and world wide extent, both in production, refining and consumption. In this Kentucky case a land owner had leased his farm to a tenant who, in digging a shallow well upon it, found what would now be called a "small showing of oil." He placed a pump in the well and gathered three barrels of the fluid. The land owner sued him in trespass and the tenant defended upon the ground that oil was similar to air and water and the land owner had no title, property or ownership therein until actually reduced to possession, and the land owner, not having reduced the fluid in possession, never had title therein, but that whatever title vested reposed in the tenant, as he was the one who reduced the fluid to actual physical possession. In this case, *Hall vs. Reed* (15 B. Mon., 479), the court held the oil to belong to the landlord.

In the case of *Funk vs. Haldeman*, 53 Pa., 229, 248, the first case coming before the Supreme Court of Pennsylvania after the drilling of the Drake well in which the character of oil and gas mining rights was examined and their peculiar nature defined, Mr. Chief Justice Woodward said:

"Throughout this opinion I have treated oil as a mineral. Until our scientific knowledge on the subject

is increased, this is the light in which the courts will be likely to regard this valuable production of the earth."

In *Stoughton's Appeal*, 88 Pa., 198, 201, a case where a guardian had executed an oil lease on his ward's property without requiring the consent or authority from the Orphans' Court so to do, and in which his power to so lease was directly challenged and denied, the Supreme Court of Pennsylvania said:

"A guardian has ordinarily, power to lease any of his ward's property that is of such character as makes it the subject of a lease, but without the approval of the Orphans' Court he cannot dispose of any part of the realty. Oil, however, is a mineral, and being a mineral is part of the realty: *Funk vs. Haldeman*, 3 P. F. Smith, 229. In this it is like coal or any other natural product, which *in situ* forms part of the land. It may become, by severance, personalty, or there may be a right to use or take it originating in custom or prescription, as the right of a life tenant to work opened mines, or to use timber for repairing buildings or fences on a farm, or for fire bote. Nevertheless, whenever conveyance is made of it, whether that conveyance be called a lease or deed, it is in effect, the grant of part of the corpus of the estate and not of a mere incorporeal right. In the case above cited this is said to be so as to leases of coal lands for the purpose of mining, and there is no reason why the same doctrine should not apply to oil leases."

In the case of *Gill vs. Weston,* 110 Pa., 312, 317, the Supreme Court of Pennsylvania, in defining the nature of petroleum oil, said:

> "It is a mineral substance obtained from the earth by a process of mining, and lands from which it is obtained may with propriety be called mining lands."

In the case of *Gas Company vs. DeWitt,* 130 Pa., 235, 249, Mr. Justice Mitchell, speaking for the Supreme Court of Pennsylvania, said:

> "The learned master says gas is a mineral, and while *in situ* is part of the land, and therefore possession of the land is possession of the gas. But this deduction must be made with some qualifications. Gas, it is true, is a mineral; but it is a mineral with peculiar attributes, which require the application of precedents arising out of ordinary mineral rights, with much more careful consideration of the principles involved than of the mere decisions. Water also is a mineral; but the decisions in ordinary cases of mining rights, etc., have never been held as unqualified precedents in regard to flowing, or even to percolating waters. Water and oil and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *ferae naturae.* In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. 'Their fugitive and wandering existence within the limits of a particular tract is uncertain' as said by Chief Justice Agnew in *Brown vs. Vandergrift,* 80 Pa., 147, 148. *They belong to the owner of the land,* and are part of it, so long as they are on or in it, and are subject to his control; but when they escape, and go into

other land, or come under another's control, the title of the former owner is gone."

In *Chartiers Block Coal Company vs. Mellon,* 152 Pa., 286, which was a contest by the owners of the coal deposits to prevent the owners of underlying oil and gas from drilling through the coal to the deposits of oil and gas below, Mr. Chief Justice Paxson said (295):

"In such cases the owner is rarely able to utilize the lower stores of wealth to which he has title, by mining operations conducted by himself, and for this reason he sells them to some person or corporation to be mined and to be moved. So it often happens that the owner of a farm sells the land to one man, the iron, or oil, or gas to another, giving to each purchaser a deed, or conveyance in fee simple for his particular deposit or stratum, while he retains the surface for settlement and cultivation precisely as he held it before. The severance is complete for all legal and practical purposes. Each of the separate layers or strata becomes a subject of taxation, of incumbrance, levy and sale, precisely like the surface."

In the case of *Hague vs. Wheeler,* 157 Pa., 324, Mr. Justice Williams, in delivering the opinion of the court which examined into the right of the owner of a gas lease to drill a gas well thereon, and then to allow the product therefrom to flow and escape into the open air against the protest of the owner of neighboring lands, said:

"But it is said that the oil and gas are unlike the solid minerals, since they may move through the inter-

stitial spaces or crevices, in the sand rocks in search of an opening through which they may escape from the pressure to which they are subject. This is probably true. It is one of the contingencies to which this species of property is subject. But the owner of the surface is an owner downward to the center, until the underlying strata have been severed from the surface by sale. What is found within the boundaries of his tract belongs to him according to its nature. The air and the water he may use. The coal and iron or other solid mineral he may mine and carry away. The oil and gas he may bring to the surface and sell in like manner to be carried away and consumed. *His dominion is, upon general principles, as absolute over the fluid, as the solid minerals.* It is exercised in the same manner and with the same results. He cannot estimate the quantity in place of gas or oil as he might of the solid minerals. He cannot prevent its movement away from him, towards an outlet on some other person's land, which may be more or less rapid, depending on the dip of the rock or the coarseness of the sand composing it; but *so long as he can reach it and bring it to the surface, it is his absolutely, to sell, to use, to give away, or to squander, as in the case of his other property.*"

These cases, cited from the supreme court of Pennsylvania are, we submit, worthy of considerable attention, by reason not only of the ability of the court which heard them, but also of the additional fact that Pennsylvania was the first state in which oil and gas were found in marketable quantities, and this court was the first which had to consider the peculiar nature of oil and gas and lay down the law arising therefrom.

We now pass to the state of West Virginia. In the case of *Williamson vs. Jones,* 39 W. Va., 231, Holt, J., speaking for the supreme court of that state, said:

> "We are met at the threshold by the contention on the part of defendant Jones that, no matter who may be the rightful owner of the land, petroleum—mineral oil—so far from being a part of the inheritances, something of which waste can be committed, is only capable of the qualified ownership of belonging to him who first appropriates it, no matter where it may be situated. Whatever the earlier decisions in other states may have been, it has never been so held in this state; and the authorities now very generally—universally, as far as I have examined them—hold petroleum to be a mineral, and as much a part of the realty as timber, coal, or iron ore, except that in proper cases its mobility as a subterranean liquid must be taken into consideration as in the case of salt water, etc. * * * Oil is a mineral and, being a mineral is part of the realty. *Funk vs. Haldeman,* 53 Pa. St., 229. In this it is like coal or any other natural product which *in situ* forms part of the land."

This case came again before the Supreme Court of West Virginia (43 W. Va., 562), where Brannon, J., speaking for the court, said:

> "Petroleum oil in its place in the land is a part of the land itself just as are ore, coal, timber and iron."

This question again came before the Supreme Court of West Virginia in *Wilson vs. Youst,* 43 W. Va., 826, and the court in an opinion wherein it examined the authorities at considerable length, held to their former opinion.

Later, in the case of *South Penn Oil Company vs. McIntire,* 44 W. Va., 296, the Court reaffirmed the doctrine laid down in *Wilson vs. Youst, supra,* and cited again the language given from *Stoughton's Appeal, supra.* Still later, in the case of *Carter vs. Tyler County Court,* 45 W. Va., 806, a case arising over the right to tax oil and gas leases, the Supreme Court of West Virginia said:

> "While the oil remains in the cavities of the rocks *in situ,* this court has held in *Wilson vs. Youst* (43 W. Va., 826), and *Williamson vs. Jones* (39 W. Va., 231), that it is part of the realty. The lessee may drill the well to the sand or rock in which the oil is contained, but the oil does not change its character from realty to personalty, or any portion of its ownership until it is brought to the surface, and then seven-eighths of it becomes the property of the lessee."

Still later, in the case of *Preston vs. White,* 57 W. Va., 278, the same court through Brannon, P. J., held to the same effect.

The same rule obtains in the Dominion of Canada, where in the case of *Ontario Natural Gas Company vs. Smart,* 19 Ont. Reports, 594, Street, P. J., in speaking of the word "mineral," said:

> "It appears, therefore, that the word is capable of construction which would make it include natural gas."

On appeal to the court of appeals *sub nomine, Ontario Natural Gas Company vs. Gossfield,* 18 Ont. Appeal Re-

ports, 628, the judgment of Street, P. J., was affirmed, the syllabus of the case reading:

> "Natural gas is a mineral within the meaning of the Municipal Act R. S. O., ch. 184, sec. 565, which gives power to the corporation of any county or township to sell or lease mineral rights."

Some litigation has arisen in the state of California upon the nature of oil and gas, and in *Isom vs. Rex Crude Oil Company*, 147 Cal., 569, the supreme court of that state used this language:

> "And if in fact the land here leased was used for a purpose other than that legitimately contemplated by the lease the section is applicable. That it was so used admits of no doubt. Oil is a mineral and as a mineral is part of realty. *Funk vs. Haldeman*, 53 Pa., 229. It is recognized as a mineral in our mining laws. Corporations formed for the purpose of securing and marketing it come within the purview of the mining laws, and claims for oil bearing lands are taken up as are claims for mineral lands. Like the precious metals, therefore, or coal, oil in place is a part of the freehold. Its severance or removal, except in proper cases, is waste."

We now call the Court's attention to a case arising in Tennessee, that of *Murray vs. Allred*, 100 Tenn., 100, where the court had before it the construction of a deed containing a reservation to the grantor of "all mines, minerals and metals in and under the land." Upon this deed the question

arose whether petroleum oil and natural gas were embraced within the reservation. The chancellor who tried the case held they were not. The court of chancery appeals reversed the chancellor and held they were. The supreme court of Tennessee affirmed the court of chancery appeals and adopted its opinion as its own. In this opinion, which contains an exhaustive examination of the authorities, is found the following language:

> "In the light of these authorities we are bound to hold that petroleum is a mineral and that it falls within the term of the reservation in the deed referred to in the foregoing case. The same is true of natural gas."

In the case of *Moore vs. Griffith*, 72 Kansas, 164, a deed came before the supreme court of Kansas for construction which contained the following reservation:

> "Reserving to said parties of the first part, their heirs and assigns, all the rights, privileges and benefits secured to the parties of the first part under an oil and gas lease executed by said parties of the first part to Guffey & Galey dated April 9, 1894, with full power and right to renew or extend, change or modify said lease with the said Guffey & Galey or their heirs and assigns as fully and to the same intent as though this conveyance had not been executed. It is intended hereby to reserve all oil and gas privileges in and to said premises and to lease and transfer the same."

The court in holding that under this deed the title to the oil and gas in the lease described therein remained in the grantors, following the case of *Murray vs. Allred, supra,* (100 Tenn., 100), said:

> "The court, in an exhaustive opinion, held that oil is a mineral, and recognized the doctrine that the ex-

ception in the deed separated the estate in the minerals from the estate in the lands, and that the possession of the surface of the land, without any denial of the mineral rights, was not adverse to the claim of the owner of the minerals. Different estates may be created in the surface and soil of lands and the underlying strata in which minerals, oil and gas may be found."

Ohio has the same rule. In that state in the case of *Kelley vs. Ohio Coal Company*, 57 Ohio, 317, Burket, C. J., speaking for the Court, said:

"Petroleum oil is a mineral, and while in the earth it is a part of the realty, and should it move from place to place by percolation or otherwise, it forms part of that tract of land in which it tarries for the time being, and if it moves to the next adjoining tract, it becomes part and parcel of that tract; and it forms part of some tract, until it reaches a well and is raised to the surface, and then for the first time it becomes the subject of distinct ownership separate from realty, and becomes personal property, the property of the person into whose well it came. And this is so whether the oil moves, percolates or exists in pools or deposits. In either event, it is the property of, and belongs to, the person who reaches it by means of a well, and severs it from the realty and converts it into personalty."

And again in *Noncmaker vs. Amos*, 73 Ohio, 163, the Supreme Court re-affirmed the principle laid down in *Kelley vs. Ohio Coal Company, supra*, and quoted at length the foregoing excerpt.

In the case of *Gas Company vs. Ullery*, 68 Ohio, 259, the Supreme Court of that state, speaking though Burket, Chief Justice, said:

> "Oil in the rock adheres to the real estate, and is a part thereof until brought to the surface, when it become personalty, just as a tree, or stone, coal or fire clay, is a part of the realty until severed, when it becomes personalty. That which is a part of the land before severance, belongs to the owner of the land after severance as well as before. The fact that oil and gas are vagrant and transitory in their nature does not prevent them from adhering to and becoming part of the land while passing from one tract to another, and while so in one tract they are a part of that tract, and belong to the owner thereof until they escape from such tract, and if brought to the surface before such escape, they become personal property, belonging to the owner of the land."

We now pass to the state of New York, in which there is but one decided case, the field of oil and gas in the Empire state being limited in its area. In *Hughes vs. United Pipe Lines*, 119 N. Y., 423, Earl, J., speaking for the Court of Appeals, said:

> "It is clear, therefore, that the plaintiff is entitled to recover the value of this oil from the defendant. He early gave it notice of his claim. He demanded the oil of it and it refused to recognize his rights. The oil in the earth belonged to him, and when taken therefrom by a wrongdoer his title to the same still remained perfect, and he could pursue and reclaim it wherever he could find it."

The syllabus of this New York case reads as follows:

"Oil in the earth belongs to the owners of the land, and when unlawfully taken therefrom by a wrongdoer the title of such oil remains perfect and he may pursue and reclaim the property wherever he may find it."

The rule as above stated prevails in every jurisdiction, except Indiana.

The courts of the latter State formulate the rule of ownership in this language:

The landowner's right in the natural gas is a qualified ownership, a right to reduce it to possession, but after he has done so his title becomes absolute as against both the public and adjoining landowners.

How substantial is this difference between the rule as stated by the Indiana courts and the rule as announced in other jurisdictions, is a question which it is not necessary here to discuss. For,—

(1) In the case at bar we are dealing with natural gas in the condition in which it is when the landowner sells and delivers it to the plaintiff gas company. The owner of the soil has reduced the natural gas to possession by collecting it from his well and confining it in the pipe through which it flows into the trunk pipe lines of the plaintiff company;

(2) Even under the Indiana rule, the landowner alone, and not the public, has the right to reduce the gas to possession and, after possession is obtained,

his title becomes absolute. And even before the owner of the land has reduced the gas to possession, he has a right of property in the gas which the Constitution protects and of which he cannot be deprived without violating its provisions.

The nature of the landowner's property in the natural gas is very exhaustively treated by Mr. Justice White in a case which arose under the Indiana law and in which the rule of Indiana courts is applied:—

Ohio Oil Company vs. Indiana, 177 U. S., 190, 208, 210:

The Supreme Court upheld the constitutionality of the statute of the state of Indiana prohibiting the owner of any natural gas or oil well to permit the gas or oil to escape and waste for a longer period than two days after gas or oil had been struck in the well.

In its opinion Mr. Justice White said:

"If the analogy between animals *ferae naturae* and mineral deposits of oil and gas, stated by the Pennsylvania court and adopted by the Indiana court, instead of simply establishing a similarility of relation, proved the identity of the two things, there would be an end of the case. This follows because things which are *ferae naturae* belong to the 'negative community;' in other words, are public things subject to the absolute control of the State, which, although it allows them to be reduced to possession, may at its will not only regulate but wholly forbid their future taking. *Geer vs. Con-*

necticut, 161 U. S., 519, 525. But whilst there is an analogy between animals *ferae naturae* and the moving deposits of oil and natural gas, there is not identity between them. Thus, the owner of land has the exclusive right on his property to reduce the game there found to possession, just as the owner of the soil has the exclusive right to reduce to possession the deposits of natural gas and oil found beneath the surface of his land. The owner of the soil cannot follow game when it passes from his property; so, also, the owner may not follow the natural gas when it shifts from beneath his own to the property of some one else within the gas field. It being true as to both animals *ferae naturae* and gas and oil, therefore, that whilst the right to appropriate and become the owner exists, proprietorship does not take being until the particular subjects of the right become property by being reduced to actual possession. The identity, however, is for many reasons wanting. In things *ferae naturae* all are endowed with the power of seeking to reduce a portion of the public property to the domain of private ownership by reducing them to possession. *In the case of natural gas and oil no such right exists in the public. It is vested only in the owners in fee of the surface of the earth* within the area of the gas field. This difference points at once to the distinction between the power which the lawmaker may exercise as to the two. In the one, as the public are the owners, every one may be absolutely prevented from seeking to reduce to possession. No divesting of private property, under such a condition, can be conceived because the public are the owners, and the enacting by the State of a law as to the public ownership is but the discharge of the governmental trust resting in the State as to property of that character. *Geer vs. Connecticut, supra.* On the other hand, as to gas and oil, the *surface*

proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They *could not be absolutely deprived of this right which belongs to them without a taking of private property.* (208-209). * * * Viewed, then, as a statute to protect or to prevent the waste of the common property of the surface owners, the law of the State of Indiana which is here attacked because it is asserted that it devested private property without due compensation, in substance, is a statute protecting private property and preventing it from being taken by one of the common owners without regard to the enjoyment of the others." (210.)

No decision of the courts of Oklahoma, defining the nature of the title of the landowner to natural gas, has come to our notice.

In *Kolachny vs. Galbraith*, 110 Pac., 902, 906, (July 12, 1910), speaking of the right of the *lessee* under a lease granting the right to *prospect* for gas upon the lands of the lessor, the Supreme Court of Oklahoma said:

"The lease relied upon by the plaintiff does not vest in him the title to the oil and gas in said land and is not a grant of any estate therein, but is simply a grant of a right to prospect for oil and gas, no title vesting until such substances are reduced to possession by extracting same from the earth—an incorporeal hereditament."

THE POLICE POWER OF A STATE DOES NOT AUTHORIZE CONSERVATION IN THE SENSE OF PROHIBITING THE SALE OF LAWFUL ARTICLES OF PRIVATE PROPERTY IN THE INTEREST OF THE GENERAL PUBLIC OR THE PEOPLE, WHO HAVE NO PROPRIETARY INTERESTS THEREIN.

Let it be assumed, for the purposes of this argument, that the state may regulate the mining, transportation, and sale of natural gas so far as is necessary to insure the public safety and health. In like manner let it be granted that the state may so legislate as to protect adjoining land owners, the gas beneath whose lands forms a common pool, from waste by one of them. Let all this be conceded as a proper application of the principle of the common law which prohibits an owner from using his property in such a manner as to injure the property of other owners. *Sic utere tuo ut alienum non laedas.*

Nevertheless, the fact remains that natural gas has always since its discovery been treated as a lawful subject of commerce and of private ownership. The legislation of Congress and the various states, including Oklahoma, authorizing its transportation in pipe lines and sale, necessarily proceeds upon the theory that natural gas is the subject of private ownership and is a lawful article of commerce, and that the use of pipe lines is a proper and lawful method of transporting the same.

Apart from the objections of the interference with and discrimination against interstate commerce—which objections we believe to be fatal—what power has a state to deny the right of the individual, whose title to the natural gas is unhampered by reservations or restrictions in its acquistion, to sell the same? We submit that the police power does not authorize such legislation: that the police power does not authorize the compulsory conservation of private property in which the people as a whole have no proprietary interest.

The line as to the extent of the police power in the conservation of natural resources is fixed at the point where the lands and the natural resources which they contain have ceased to be public property and have passed into the domain of private ownership. In regard to property so exclusively owned by private individuals the state must either appropriate by the exercise of its power of eminent domain and make compensation therefor, or leave the owner free to sell the same, or introduce it into interstate commerce, as he may prefer.

Missouri Pacific Ry vs. Nebraska, 164 U.S. 403, 417.
Willcox vs People, 117 Ill. 294, 303-305
People ex rel Groff vs Kirk, 136 N.Y. app. 210-45

WHEN THE LEGISLATURE PROHIBITS THE SALE OF PRIVATE PROPERTY FOR THE SOLE AND ONLY PURPOSE OF PROVIDING A FUTURE SUPPLY OF FUEL FOR THE PUBLIC, IT IS APPROPRIATING PRIVATE PROPERTY FOR PUBLIC USE AND COMPENSATION MUST BE MADE.

Even in case of a *bona fide* conservation statute, the owner of the gas cannot be denied his right to sell it, unless compensation is made to him. The gas is a lawful article of commerce. The wells and the gas which they contain are not dangerous to public health or safety and cannot be abated as nuisances.

A conservation statute would compel the owner to keep his gas stored in the ground for the purpose of providing a fuel supply for the public. The right to sell would be interdicted for no other purpose except that the public, at some future time, enjoy the benefit of a supply of gas.

Enacting such a conservation statute, the State, while not necessarily taking the legal title to the gas, compels the owner to hold the title to it for the benefit of the public as beneficiaries. Such legislation would be the appropriation of private property for public use and would be unconstitutional unless they provided for compensation to the owner.

The distinction between police power and the power of eminent domain was drawn by this court in—

Sweet vs. Rechel, 159 U. S., 380, 398, 399.

In the opinion in this case, Mr. Justice Harlan reviewed the case of *Bancroft vs. Cambridge,* 126 Mass., 438, which upheld a statute empowering the City of Cambridge to require the owners of certain lands to fill them to a prescribed grade, or, if the owners refused, to take the lands and make the improvement itself, for the purpose of abating a nuisance.

The learned Justice was of the opinion that in the event that the land was taken by the city, compensation would have to be made although the purpose of the taking was to abate a nuisance and preserve the public health. He said:

> "That case, it is manifest, proceeded upon the ground that the provisions of the constitution above quoted are to be construed together, so that if private property be actually taken and appropriated for public uses, although taken or appropriated in virtue of a statute having as its main or primary object *the conservation of the public health*, reasonable compensation must be made to the owner. This necessarily follows from the restriction imposed by the constitution to the effect that statutes passed in the exercise of the police power of the Commonwealth must not be repugnant or contrary to the constitution, one of the provisions of which is, that the owner of private property, *appropriated to public uses*, shall receive a reasonable compensation therefor. * * *
>
> "Undoubtedly, the State, without taking the title to itself, may, in some appropriate mode and without compensation to the owner, forbid the use of specified private property, where such use would be injurious to the public health. For, as said by Chief Justice Shaw in *Commonwealth vs. Alger*, 7 Cush., 53, 84, 'It is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, how-

ever absolute and unqualified may be his title, holds it under the implied liability that his use of it shall be so regulated that it be not injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community.' 'Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.' * * *

"When, however, the legislature provides for the actual taking and appropriation of private property for public uses, its authority to enact such a regulation rests upon its right of eminent domain—a right vital to the existence and safety of government. But it is a condition precedent to the exercise of such power that the statute make provision for reasonable compensation to the owner."

McGehee, in his discussion of this question in his work on *"Due Process of Law,"* page 205, says:

"When, however, public purposes require for the effective exercise of the police power an actual appropriation of the property of citizens chargeable with no wrong, the eminent domain as well as the police power is involved and compensation must be made to the owners."

The law has been declared in accordance with our views by the Court of Appeals of New York.

THE MINERAL SPRINGS DECISIONS IN NEW YORK.

Hathorn vs. Natural Carbonic Gas Co., 194 N. Y., 326; 23 L. R. A. N. S., 436:

The plaintiff and defendant were owners of lands in the town of Saratoga Springs, New York, upon which were located wells containing mineral water charged with carbonic acid gas. The plaintiff sought an injunction to restrain the defendant from using pumps in his wells in violation of a statute of the state. The provisions of the statute were summarized by the court as follows (445):

> "* * * these prohibitions are four in number, and in effect they respectively forbid accelerating or increasing the flow of percolating waters or natural carbonic acid gas, such as are found at Saratoga Springs, from wells bored into the rock by pumping or any artificial contrivances whatsoever; *first*, absolutely and without qualification; *second*, when the result of so doing will be to impair the natural flow or the quality of such waters or gas in the spring or well of another person; *third*, when the object of so doing is to extract and collect the carbonic acid gas for the purpose of marketing the same; and *fourth*, prohibit the doing of any act whereby the flow or quality of the waters described or of the carbonic acid gas or other mineral ingredients therein in any spring or well is diminished, etc."

The Court of Appeals applied the rule of the common law in regard to the right of landowners in subterranean

waters, and held that the first, second and fourth of these prohibitions, as they diminished the rights which the land-owners had at common law, were unconstitutional.

The court also held that the defendant's acts in using pumps for the purpose of extracting merely the gas from the water in the wells amounted to an unreasonable use under the common law rule, and therefore the third prohibition was constitutional.

This case was heard on demurrer and all of the allegations in this bill in regard to the injury to adjoining lands by exhausting the mineral springs were taken as admitted.

The same statute was considered in the later decision of

People vs. Natural Carbonic Acid Co., 196 N. Y., 421 (1909):

This was a proceeding by the Attorney General to enforce the provisions of the statute, and the point decided was that it was error to refuse to permit the defendant to introduce evidence to show that his use of pumps in his wells did not diminish the supply of the adjoining land owners.

The court based its decision on the ground that *the police power of the state did not extend to the conservation of natural resources generally* and that the statute was unconstitutional except insofar as it prohibited a land owner from pumping the water to such an extent as would, under the

test of the common law, unreasonably interfere with the equal rights of owners of adjoining lands.

In the opinion of the court, Judge Gray said:

"The legislature could not enact arbitrarily upon the subject and we should not so read the act, in question. We must read into it the intent to regulate the conflicting rights of land owners, who derive enjoyment, or profit, from the use of these waters within the earth and of their constituent ingredients and gases. In that aspect, the enactment was a proper exercise of the police power, which the government possesses and by which, among other objects of governmental solicitude, it regulates the intercourse of citizens and insures 'to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others.' (*People ex rel. N. Y. Electric Lines Co. vs. Squire*, 107 N. Y., 593, 605; *Cooley's Constit'l Limitations*,, * 572. It is for the interest of the state that no one should use his own property improperly; but *the state could not, under the plea of protecting its natural resources, arbitrarily, arrest the work of the defendants and deprive them of the right to prosecute a lawful business*, whatever its effect upon the subterranean mineral waters and gases. *Such an exercise of the police power would be highly unreasonable and irreconcilable with the rules of law, under which rights in property have been held and recognized.* To prohibit the defendants from conducting a lawful business, in the manner they had established, is to destroy a right, which they possessed, and, it may be, to annihilate the business; but whatever the degree, it is a taking of property within the constitutional provision. (*Wynehamer vs. People*, 13 N. Y., 378; *In re Jacobs*, 98 Ib., 98.) It does not

appear that the state has any property in mineral springs to protect. The land affected is held in private ownership and if the rights of an owner to its full use and enjoyment, in lawful ways, are destroyed, or impaired, property is taken and that the Constitution of the state forbids; unless, when taken for public uses, just compensation be made." (435-436.)

In a concurring opinion in which Judges Haight and Willard Bartlett joined, Chief Judge Cullen said:

"I concur in the opinion of Gray, J., for reversal of the judgments appealed from in these cases, but desire to add a word in answer to one argument pressed on us by the learned attorney general. It is urged that the public have such an interest in the mineral waters of Saratoga, because of their great curative and health giving properties, that the legislature may interpose for their protection under the right of the state in the exercise of its police power 'to protect and develop its natural resources,' even though the waters themselves are the property of private persons. I deny that the police power vests in the legislature any such right. 'The police power of the government, as understood in the constitutional law of the United States, is simply the power of the government to establish provisions for the enforcement of the common as well as civil law maxim, *sic utere tuo, ut alienum non laedas*' (*Tiedeman's Limitations of Police Power*, p. 4), that is to say, one cannot use his own property so as to injure the rights of others, nor can he use it in such a manner as to offend against public morality, health or peace and good order. In the exercise of this power, doubtless, the legislature may not only prohibit acts of commission on the part of the owner, but acts of omission, provided the result of such omission is to invade the rights of others or those of the public. But *under that power the legisla-*

ture cannot require an owner to use his property for the advantage and benefit of others or of the public, or even for his own benefit, nor restrain him from devoting it to such purpose as he sees fit, or even from wasting it, provided such use does not conflict with the rights of others or the public. (*Matter of Ryers*, 72 N. Y., 1.) A man owning a coal mine may mine the coal and waste it, regardless of the interest of the present generation or of succeeding ones. It is not that such conduct would not be an evil, but because the people who framed our system of government taught by experience, deemed it wiser to trust the use of property to the dictates of the intelligent self-interest of the owner, rather than to subject it to governmental interference. * * *

"I concurred in the affirmance of the judgment in the *Hathorn case* because, on the facts alleged in the complaint in that case, I thought the defendant's use of the water unreasonable within the doctrine of the *Forbell case*, and I concurred in upholding the statute because I deemed it an adjustment of conflicting private rights and the apportionment of a common property right among several owners. That is a recognized branch of the police power. (*Dorrity vs. Rapp*, 72 N. Y., 307; *Ohio Oil Co. vs. Indiana*, 177 U. S., 190.) If, however, the fact is that the source of supply from which the defendant draws water is not a common one, but exclusively on its own land, or if its appropriation of the water in no way affects the supply of water on other lands, then the statute has no application."

In *Lindsley vs. Natural Carbonic Gas Co.*, 162 Fed., 954, 170 Fed., 1023, the Circuit Court for the Southern District of New York upheld this same statute on the ground that it merely protected the common rights of the group of landowners in the mineral waters in accordance with the principles of the common law.

This decision was affirmed on these grounds by this Court in an opinion rendered on March 13, 1911.

THE OWNER OF NATURAL GAS HAS THE CONSTITUTIONAL RIGHT TO SELL HIS GAS IN THE MOST FAVORABLE MARKET.

The appellee Lewis has the right to sell his gas to the appellee gas companies, if he chooses, and especially if, as he avers (Record, pp. 73-74), no market for his gas exists within the state of Oklahoma. To deny him this right is to deprive him of his property without due process of law, and to take the same without making compensation, in violation of the Fourteenth Amendment.

As Mr. Justice Bradley said in *Slaughter-House Cases*, 16 Wall., 36, 127:

> "The right of property includes the right to dispose of it according to the will of the owner."

That the owner of land has a right to the natural gas deposited beneath the surface which is protected by the constitution was plainly asserted by Mr. Justice White in the opinion of this court in

Ohio Oil Co. vs. Indiana, 177 U. S., 190:—

Speaking of the right to the natural gas under the Indiana rule as distinct from the right to game, the learned justice said (209):

> "On the other hand, as to gas and oil, *the surface proprietors* within the gas field all have the right to

reduce to possession the gas and oil beneath. They *could not be absolutely deprived of this right which belongs to them without a taking of private property.*"

The phrase "absolutely deprived" was used in distinction with a prohibition against allowing the gas to escape and waste, which the decision held to be constitutional.

In addition to the foregoing authorities denying the right of a state, under the cloak of its police power, to conserve its natural resources in the interest of the general public and at the expense of the private owners thereof, we desire to again call the court's attention to the case of

Manufacturers Gas & Oil Co. vs. Indiana Nat. Gas & Oil Co., 156 Ind., 679:—

This decision squarely rules that any owner of natural gas may seek the best market available for the disposal of his product, irrespective of the declared policy of the state to conserve the supply by prohibiting its transportation out of the state:

> "Nothing done by the appellee is complained of, excepting only that it removes natural gas out of the state of Indiana. No ground for the exercise of the police power of the state to prevent such removal is shown. Nothing save the naked right to transport the gas beyond the limits of this state, is contested in this action. The only reason which can be urged in support of the restraint sought to be imposed upon the appellee is that, the supply of natural gas being limited, and the article being one of great value and convenience, its use ought to be reserved for and enjoyed by the people of this

state, to the exclusion of the inhabitants of any other state. But, as natural gas, when reduced to possession, is held to be a commercial commodity, its owner cannot lawfully be prevented from carrying it to and selling it in whatever market he may consider most advantageous."

THE CASES CITED BY APPELLANT, IN WHICH STATUTES DEALING WITH GAME, WATERS OF STREAMS AND THE ATMOSPHERE, PROCEED UPON A WHOLLY DIFFERENT PRINCIPLE.

Geer vs. Connecticut, 161 U. S., 519, 526-527, 529-530, 532:

A statute of the state of Connecticut providing that game killed within the state should not be transported beyond its limits and imposing criminal penalties was held constitutional.

The opinion on the question of the ownership of the property involved is so exhaustive and so thoroughly in accord with our views that we quote it at some length.

Mr. Justice White said:

"The common law of England also based property in game upon the principle of *common ownership*, and therefore treated it as subject to governmental authority. * * *

"'But after all, there are some few things which, notwithstanding the general introduction and continu-

ance of property, must still unavoidably remain in common, being such wherein nothing but an usufructuary property is capable of being had; and therefore they still belong to the first occupant during the time he holds possession of them and no longer. Such (among others) are the elements of light, air and water, which a man may occupy by means of his windows, his gardens, his mills and other conveniences; such also are the generality of those animals which are said to be *ferae naturae* or of a wild and untamable disposition, which any man may seize upon and keep for his own use or pleasure.' 2 Bl. Com. 14.

"'A man may lastly have a qualified property in animals *ferae naturae, propter privilegium,* that is, he may have the privilege of hunting, taking and killing them in exclusion of other persons. Here he has a transient property in these animals usually called game so long as they continue within his liberty, and may restrain any stranger from taking them therein; but the instant they depart into another liberty, this qualified property ceases. * * * A man can have no absolute permanent property in these, as he may in the earth and land; since these are of a vague and fugitive nature, and therefore can admit only of a precarious and qualified ownership, which lasts so long as they are in actual use and occupation, but no longer.' 2 Bl. Com. 394. * * *

"Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the State, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not

as a prerogative for the advantage of the government, as distinct from the people, or for the benefit of private individuals as distinguished from the public good. Therefore, for the purpose of exercising this power, the State, as held by this court in *Martin vs. Waddell,* 16 Pet., 410, represents its people, and the *ownership is that of the people in their united sovereignty.* * * *

"The sole consequence of the provision forbidding the transportation of game, killed within the State, beyond the State, is to *confine the use of such game to those who own it, the people of that State.* The proposition that the State may not forbid carrying it beyond her limits involves, therefore, the contention that a State cannot allow its own people the enjoyment of the benefits of the property belonging to them in common, without at the same time permitting the citizens of other States to participate in that which they do not own. It was said in the discussion at bar, although it be conceded that the State has an absolute right to control and regulate the killing of game as its judgment deems best in the interest of its people, inasmuch as the State has here chosen to allow the people within her borders to take game to dispose of it, and thus cause it to become an object of State commerce, as a resulting necessity such property has become the subject of interstate commerce, and is hence controlled by the provisions of Article 1, Section 8, of the Constitution of the United States. But the errors which this argument involves are manifest. It presupposes that where the killing of game and its sale within the State is allowed that it thereby becomes commerce in the legal meaning of that word. In view of the authority of the State to affix conditions to the killing and sale of game, predicated as is this power on the peculiar nature of such property

and its common ownership by all the citizens of the State, it may well be doubted whether commerce is created by an authority given by a State to reduce game within its borders to possession, provided such game be not taken, when killed, without the jurisdiction of the State. The common ownership imports the right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose. The qualification which forbids its removal from the State necessarily entered into and formed part of every transaction on the subject, and deprived the mere sale or exchange of these articles of that element of freedom of contract and of full ownership which is an essential attribute of commerce. * * * The power of the State to control the killing of and ownership in game being admitted, the commerce in game, which the state law permitted, was necessarily only internal commerce, since the restriction that it should not become the subject of external commerce went along with the grant and was a part of it. All ownership in game killed within the State came under this condition, which the State had the lawful authority to impose, and no contracts made in relation to such property were exempt from the law of the State consenting that such contracts be made, provided only they were confined to internal and did not extend to external commerce."

These same principles are all that were asserted in the later case of *Silz vs. Hesterberg*, 211 U. S., 31.

Georgia vs. Tennessee Copper Company, 206 U. S., 230, 237:

The state of Georgia filed a bill in equity in the Supreme Court of the United States praying for an injunc-

tion to enjoin certain copper companies whose works were located in the state of Tennessee from discharging noxious gases over the plaintiff's territory.

The Supreme Court granted the injunction and in its opinion Mr. Justice Holmes said:

> "This is a suit by a State for an injury to it in its capacity of *quasi*-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. *It might have to pay individuals before it could utter that word*, but with it remains the final power."

It will be observed that Mr. Justice Holmes, while declining to decide a question not before him, expressly recognizes the possibility of the state being required to compensate owners for property injured by its plan of conservation.

Hudson Water Company vs. McCarter, 209 U. S., 349:

A statute of the state of New Jersey prohibited transportation by pipes of

> "the waters of any fresh water lake, pond, brook, creek, river or stream of this state into any other state, for use therein."

The defendant water company entered into a contract with the city of New York to furnish the latter water from the Passaic River in the state of New Jersey. The company had no other rights to the waters of the stream than those of a riparian owner.

On information by the attorney-general the New Jersey Court of Chancery granted an injunction restraining the transportation of the waters of the river out of the state.

In the opinion of the Court of Errors and Appeals of New Jersey sustaining the injunction, it was said, (*McCarter, Attorney-General, vs. Hudson County Water Co.*, 70 N. J. Eq., 695, 710-711):

> "We may concede, also, for present purposes, that subterranean waters, such as may be reached only by driving wells, when thus acquired, become absolutely the property of the proprietor of the soil, and may be dealt with by him as merchandise, and that if they be thus converted into a merchantable commodity the state would not be permitted to prohibit its transportation beyond the confines of the state. Water thus taken from wells may be placed on the same plane with oil and *natural gas*, concerning the latter of which it was held, by the supreme court of Indiana, in *State, ex rel. Corwin, vs. Indiana and Ohio Oil, &c., Co.*, 120 Ind., 575, that the *state could not constitutionally prohibit its transportation beyond the confines of the state.* * * *
>
> "And since the exercise of all rights of private ownership by all riparian owners still leaves the stream to remain as a running stream, there remains a *residuum* of common or public ownership that under our system rests in the state as a trustee for all the people. * * *

"Such private title as may be acquired in water, the liquid, when separated from its natural bed, may, for convenience, be described as a title by occupancy, and the question remains, how far does the law authorize the acquisiton of such a title? As already shown, the common law authorizes its acquisition only by riparian owners, and for purposes narrowly limited. Beyond that the ownership is common and public."

It will be observed that the opinion of the state proceeded exclusively upon the common law principle that the waters of the river were the common property of the people as a whole, and the riparian owner had no title but merely a limited right of appropriation.

On appeal to this court, the decision was affirmed, in an opinion delivered by Mr. Justice Holmes, in which he said (209 U. S., 349, 356):

"* * * it appears to us that few public interests are more obvious, indisputable and independent of particular theory than *the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished*, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a State, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots. Whether it be said that such an interest justifies the cutting down by statute, without compensation, in the exercise of the police power, of what otherwise would be private rights of property, or

that *apart from statute those rights do not go to the height of what the defendant seeks to do,* the result is the same. But we agree with the New Jersey courts, and think it quite beyond any rational view of riparian rights that an *agreement, of no matter what private owners, could sanction the diversion of an important stream outside the boundaries of the State in which it flows.* The private right to appropriate is subject not only to the rights of lower owners but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health."

While the opinion of Mr. Justice Holmes took a wider scope than that of the state court, it agreed with the latter that the riparian owner had no title to the waters. And it is submitted that in Mr. Justice Holmes' opinion the controlling element in the case was the right of the state to insist that the waters of a natural public stream should not be "diverted" but should remain "substantially undiminished," as indeed the principles of the common law required. The Supreme Court recognized and relied upon the fact that the property, the transportation of which was prohibited, was not the private property of an individual.

THE BILL WAS PROPERLY FILED AGAINST THE ATTORNEY GENERAL AND THE OTHER OFFICERS MADE DEFENDANTS.

Has the Circuit Court jurisdiction to enjoin the appellants, they being officers of the State of Oklahoma? In other words, is this a suit against the state and forbidden by the Eleventh Amendment?

This question seems to be settled adverse to appellants in *Ex parte Young,* 209 U. S., 123, but we are not unwilling to discuss it.

Our opponents, relying upon the eleventh amendment to the Federal Constitution, deny jurisdiction and charge the suit to be one against the state and therefore forbidden. The Eleventh Amendment reads:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state or by officers or subjects of any foreign state."

Upon reference to the bill (Record, p. 1) it will be noted that not one of the defendants in the bill is sued in his capacity as an officer of the state of Oklahoma. Each of them is named in the caption of the bill as an individual and sued as such. The bill charges the defendants as individuals with attempting to prevent the transportation of natural gas produced in Oklahoma beyond the limits of the state, and with that end in view with committing certain overt and tortious acts.

They have caused a statute, known as Chapter 67, of the session laws of 1907-1908, to be passed by the legisla-

ture of Oklahoma, an act so vicious that it does not stop at regulation but absolutely annihilates all interstate traffic in natural gas.

The have, with physical force and violence, seized, torn up and destroyed an interstate gas line in course of construction across the line dividing Oklahoma and Kansas.

They have caused the state line to be patrolled on the Oklahoma side with armed guards, ordered to resist forcibly the laying of any gas line across it.

They threaten and purpose tearing up and destroying by force and violence any pipe line, including appellees', transporting natural gas from Oklahoma.

They have thrown into the hands of a receiver a gas line running from Oklahoma into Kansas and constructed long before Oklahoma became a state, on the charge that it is a nuisance and a menace to public safety, when in truth the real object was to stop the line from transporting natural gas into Kansas, and so cunningly drew their petition as to conceal the federal question involved and prevent the removal of the suit into the federal courts.

They have instituted vexatious and harrassing suits against natural gas corporations operating only in Kansas but who purpose extending their lines into Oklahoma, and so cunningly prepared their bills that the federal question involved was not disclosed, and the removal of the cases into the federal courts was prevented.

They threaten, and it is their purpose, by virtue of Chapter 67, to institute suits in the state courts of Oklahoma against appellees and all other parties, who purpose building interstate gas lines, to prevent the laying thereof,

and so cunningly to draft their petitions, as to conceal the federal question involved and thus prevent a removal of the cases into the federal courts and thereby compel the defendants to submit to vexatious delays and adverse decisions in the Oklahoma courts and prevent as long as possible an appeal to the supreme court of the United States.

The foregoing acts were averred in the Bill of Complaint to have been committed by the different defendants, and are not denied in answers by any of the defendants, except Mr. West, the Attorney General. All the defendants, except Mr. West, withdraw such answers as had been filed by them, and as to them the allegations of the Bill of Complaint must be taken as confessed.

While Charles West, the Attorney General, is the only one of the defendants who formally appealed to this court, nevertheless the acts of all the defendants to the Bill of Complaint are properly before this court because of the stipulation entered into by them, the language of which is as follows:

> "In the event the decree of this court is for the plaintiff in said causes, the said defendant, Charles West, may be allowed to appeal therefrom to the United States Supreme Court, and any final decision and judgment upon the merits in said causes shall have the same effect upon all said defendants as if all has appealed."
>
> (Record, p. 105).

The acts which are admitted to have been done or contemplated by Mr. West are stated by him in Paragraph 16 of his answer in the following language (Rec. 112):

> "This respondent admits that by virtue of his office under the constitution and laws of the State of Oklahoma, he is clothed with power and authority, and

charged with the duty of executing and enforcing the laws of the State in the protection of public rights, and particularly in respect to the execution and enforcement of the provisions of Chapter 67 of the Session Laws of the State enacted in 1907 and 1908, and other acts amendatory and supplementary thereto, in so far as the same must or shall be done by litigation in which the state is interested, but as to his duties, that they rest solely upon himself and are not upon him in connection with or controlled by any other officer whatsoever, but he denies that as such officer or otherwise, he has assumed or undertaken to execute or enforce said act by force of arms or otherwise, except as herein stated; and further this defendant denies that it is his purpose and intent, either avowed or otherwise, to prevent the transportation of natural gas in Oklahoma beyond the limits of the State; but he avers that he intends acting under his duty as Attorney General to prevent solely by actions in competent courts, the laying or constructing or operation of gas pipe lines, in, on, under, across or along the highways of the State by the complainant or any other person not authorized so to do by the laws of Oklahoma; and this defendant denies the allegations set forth in paragraphs *a, b, c* and *e* of the Sixteenth paragraph of the Bill, and as to the paragraph *d* therein contained, he admits that he as such officer caused a pipe line owned and operated by one Charles Owen to be put into the hands of a receiver and admits that the same was done through an action commenced in the courts of Washington County, Oklahoma, by the filing of a petition, and that Exhibit 'F' is a true copy thereof. He admits that the stipulation was entered into as shown by Exhibit 'B' and that a judgment and order was entered as therein shown, but he denies that said pipe line was

created and used wholly for the transportation and carriage of natural gas from Oklahoma to Kansas and avers that said pipe line was being used for the transportation of natural gas from Oklahoma to Kansas and avers that said pipe line was being used for the transportation of natural gas both from Oklahoma to Kansas and between different points in the State of Oklahoma and he denies that the petition was wickedly, cunningly and fraudulently drawn to conceal the fact that said line was engaged in interstate commerce and he alleges that said petition was candidly and honestly framed under the Statutes of the State of Oklahoma dealing with nuisances and their abatement."

These overt acts, open threats and declared purposes, charged in the bill and admitted by the defendants, are sufficient grounds upon which to sustain the jurisdiction of the circuit court had the defendants not been officers of the state of Oklahoma, for surely no one will contend that that court could not restrain the defendants as individuals from committing such acts of violence and such continued and repeated trespasses upon the appellees' rights and property. It is also clear that the court could have restrained these defendants, if they had not been officers of the state of Oklahoma, from harrassing the appellee with vexatious suits at law, for it is a uniform and universal rule that such an injunction will run against the institution even of criminal proceedings: *Atlanta vs. Gas Light Co.*, 71 Ga., 126; *Pueblo etc., Co., vs. Commissioners*, 5. Col. App. 129; *Schandler Bottling Co. vs. Welsh*, 42 Fed., 561; *Emperor of Austria vs. Day*, 3 D. F. & J., 217; *City of La Harpe vs.*

Elm, etc., Gas Co., 69 Kan., 97; *Springhead Spinning Co. vs. Riley*, L. R., 6 Eq., 558; *Davis & Farnum Mfg. Co. vs. Los Angeles*, 189 U. S., 209; *Dobbins vs. Los Angeles*, 195 U. S., 223; *Smyth vs. Ames*, 169 U. S., 466; *Ex parte Young*, 209 U. S., 123.

In the case of *Davis & Farnum Mfg. Co. vs. Los Angeles*, (189 U. S., 207), Mr. Justice Brown, in delivering the opinion of the court, said (218):

> "It would seem that, if there were jurisdiction in a court of equity to enjoin the invasion of property rights through the instrumentality of an unconstitutional law, that jurisdiction would not be ousted by the fact that the state had chosen to assert its power to enforce such law by indictment or other criminal proceeding. *Springhead Spinning Co. vs. Riley*, L. R., 6 Eq., 551, 558."

In the case of *Dobbins vs. Los Angeles*, (195 U. S., 223), Mr. Justice Day said (241):

> "It is well settled that, when property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity."

In the case of *Ex parte Young*, (209 U. S., 123), the attorney general argued that it was beyond the jurisdiction of the federal courts to enjoin him from instituting proceedings in the state courts of Minnesota. The court rejected this argument, Mr. Justice Peckham saying in delivering the opinion of the court (155):

> "The various authorities we have referred to furnish ample justification for the assertion that individuals who, as officers of the state, are clothed with some

duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a federal court of equity from such action."

This case of *Ex parte Young* goes to the full extent of upholding the enjoining of criminal prosecutions, the learned justice upon this point using the following language (161):

"It is further objected (and the objection really forms part of the contention that the state cannot be sued) that a court of equity has no jurisdiction to enjoin criminal proceedings by indictment or otherwise, under the state law. This, as a general rule, is true. But there are exceptions. When such indictment or proceeding is brought to enforce an alleged unconstitutional statute, which is the subject matter of inquiry in a suit already pending in a Federal Court, the latter court, having first obtained jurisdiction over the subject matter, has the right, in both civil and criminal cases, to hold and maintain such jurisdiction, to the exclusion of all other courts, until its duty is fully performed. * * * Where one commences a criminal proceeding who is already party to a suit then pending in a court of equity, if the criminal proceedings are brought to enforce the same right that is in issue before that court, the latter may enjoin such criminal proceedings. *Davis & Co. vs. Los Angeles*, 189 U. S., 207. In *Dobbins vs. Los Angeles*, 195 U. S., 223, 241, it is remarked by Mr. Justice Day in delivering the opinion of the court, that 'it is well settled that where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may

be reached and controlled by a decree of a court of equity.' *Smith vs. Ames, supra* (169 U. S., 466), distinctly enjoined the proceedings by indictment to compel obedience to the rate act. These cases show that a court of equity is not always precluded from granting an injunction to stay proceedings in criminal cases, and we have no doubt the principle applies in a case such as the present."

From these authorities it is clear that if the defendants in the bill had been private citizens and not officers of the state of Oklahoma, the circuit court would have had jurisdiction to enjoin them from the commission of the acts charged against them. Does the fact of their being officers of the state alter this rule? Our contention, stated concisely, is that the defendants under color of a state statute are about to commit certain tortious acts upon the property and rights of our client. It may be that, if this act were constitutional, this suit would be one against the state and the circuit court would have no jurisdiction; but if, on the other hand, the statute be unconstitutional, then it is no act at all but a mere blur on the legislative records, and affords and can afford the defendants no protection whatever in the commission of their wrongful acts. For while they may allege that they are acting under the statute as officers of the state, still the statute, being a nullity and without substance, fails to clothe them with an official character and leaves them merely naked individuals about to commit wrongful trespasses upon our clients' property.

SUITS AGAINST STATE OFFICERS FOR NEGATIVE, AND NOT AFFIRMATIVE RELIEF, WHERE THE OFFICERS JUSTIFY UNDER AN UNCONSTITUTIONAL ACT, ARE NOT INHIBITED BY THE ELEVENTH AMENDMENT.

We now pass to those authorities wherein this court has sanctioned jurisdiction in a circuit court over officers of a state sued individually, and in which negative and not affirmative relief is sought, and where the defendants were restrained from the commission of acts which they attempted to justify under an unconstitutional state law. It will be found that in all of these cases the unconstitutional law has been treated as no law.

In the case of *In re Ayres,* 123 U. S., 443, the supreme court, while it denied jurisdiction over the attorney general of Virginia, yet expressly distinguished cases like the one at bar, saying (506):

> "But this is not intended in any way to impinge upon the principle which justifies suits against individual defendants, who, under color of the authority of unconstitutional legislation by the state, are guilty of personal trespasses and wrongs, nor to forbid suits against officers in their official capacity either to arrest or direct their official action by injunction or *mandamus* where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest."

And in the case of *Poindexter vs. Greenhow,* 114 U. S., 270, Mr. Justice Matthews, after speaking of cases where an

individual is sued not as an officer, but because he happens to be an officer of the state, and who defends by saying he acted under the laws of his state, said (288):

> "The *ratio decidendi* in this class of cases is very plain. A defendant sued as a wrongdoer, who seeks to substitute the state in his place, or to justify by the authority of the state, or to defend on the ground that the state has adopted his act and exonerated him, cannot rest on the bare assertion of his defense. He is bound to establish it. The state is a political corporate body, can act only through agents, and can command only by laws. It is necessary, therefore, for such a defendant, in order to complete his defense, to produce a law of the state which constitutes his commission as its agent, and a warrant for his act. This the defendant in the present case undertook to do. He relied on the act of January 26, 1882, requiring him to collect taxes in gold, silver, United States treasury notes, national bank currency, and nothing else, and thus forbidding his receipt of coupons in lieu of money. That, it is true, is a legislative act of the government of Virginia, but it is not a law of the state of Virginia. The state has passed no such law, for it cannot; and what it cannot do, it certainly, in contemplation of law, has not done. The Constitution of the United States and its own contract, both irrepealable by any act on its part, are the law of Virginia; and that law made it the duty of the defendant to receive the coupons tendered in payment of taxes, and declared every step to enforce the tax, thereafter taken, to be without warrant of law, and therefore a wrong. He stands then, stripped of his official character, and, confessing a personal violation of the plaintiff's rights, for which he must personally answer, he is without defense. * * *

"In no other way can the supremacy of that constitution be maintained. It creates a government in fact as well as in name, because its constitution is the supreme law of the land, 'anything in the constitution or laws of any state to the contrary notwithstanding;' and its authority is enforced by its power to regulate and govern the conduct of individuals, even where its prohibitions are laid only upon the states themselves. The mandate of the state affords no justification for the invasion of rights secured by the constitution of the United States; otherwise that constitution would not be the supreme law of the land. When, therefore, an individual defendant pleads a statute of a state, which is in violation of the constitution of the United States, as his authority for taking or holding property to which the citizen asserts title, and for the protection or possession of which he appeals to the courts, to say that the judicial enforcement of the supreme law of the land, as between the individual parties, is to coerce the state, ignores the fundamental principles on which the constitution rests, as contrasted with the articles of confederation which it displaced and practically makes the statutes of the states the supreme law of the land within their respective limits." (292).

In this last case this court assumed jurisdiction and granted relief against defendants, even though officers of the state. At the same time and with the same effect, there were decided the cases of: *White vs. Greenhow*, 114 U. S., 307; *Claffin vs. Taylor*, Ibid., 309, and *Allen vs. Baltimore, etc., R. R. Co.*, Ibid., 311.

In the case of *Pennoyer vs. McConnaughy,* 140 U. S., 1, 9, Mr. Justice Lamar states the rule with precision, as follows:

> "In the application of this latter principle two classes of cases have appeared in the decisions of this court, and it is in determining to which class a particular case belongs that differing views have been presented. The first class is where the suit is brought against the officers of the state, as representing the state's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts. * * * The other class is where a suit is brought against defendants, who, claiming to act as officers of the state, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the state, or for compensation in damages, or, in a proper case where the remedy at law is inadequate for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain legal duty, purely ministerial, is not within the meaning of the eleventh amendment an action against the State."

The next case to which we call the attention of this Court is that of *Ex parte Tyler,* 149 U. S., 164, where a sheriff of South Carolina applied for a writ of *habeas corpus* upon the United States Marshal of his district who had him in custody for contempt. The opinion of the court is delivered by the late Chief Justice Fuller, who, after approving

the case of *Pennoyer vs. McConnaughy, supra* (140 U. S., 1), and quoting practically the above language, refers to the case of *Osborn vs. Bank* (9 Wheat., 738), and says (190):

> "And while it was conceded that the principle stated by Chief Justice Marshall in the leading case of *Osborn vs. Bank of United States,* 9 Wh., 738, that 'in all cases where jurisdiction depends on the party, it is the party named in the record,' and that 'the eleventh amendment is limited to those suits in which a state is a party to the record,' had been qualified to a certain degree in some of the subsequent decisions of this court; yet it was also rightly declared that the general doctrine there announced that the circuit courts of the United States will restrain a state officer from executing an unconstitutional statute of the state, when to execute it would be to violate rights and privileges of the complainant that had been guaranteed by the constitution and would do irreparable damage and injury to him, has never been departed from."

The language of Mr. Justice Lamar, which we have quoted from the *Pennoyer case,* was still further approved and quoted by Mr. Justice Brewer in *Reagan vs. Farmers etc., T. Co.,* 154 U. S., 389, where an injunction was upheld against the railroad commission and attorney general of Texas.

To the same effect is *Smyth vs. Ames,* 169 U. S., 466, where the supreme court affirmed a decree of the circuit court for the Nebraska district perpetually enjoining the attorney general and board of transportation from putting into effect certain unconstitutional rates.

This case was followed by *Prout vs. Starr,* 188 U. S., 537, wherein an injunction against the attorney general of Nebraska, restraining him from enforcing an unconstitutional law of the state was upheld. Mr. Justice Shiras, after quoting from the opinion in *Smyth vs. Ames,* said (543):

> "The constitution of the United States with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity. It would, indeed, be most unfortunate if the immunity of the individual states from suits by citizens of other states provided for in the eleventh amendment, were to be interpreted as nullifying those other provisions which confer power on Congress to regulate commerce among the several states, which forbid the states from entering into any treaty, alliance or confederation, from passing any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or, without the consent of Congress, from laying any duty of tonnage entering into any agreement or compact with other states, or from engaging in war—all of which provisions existed before the adoption of the eleventh amendment, which still exists and which would be nullified and made of no effect if the judicial power of the United States could not be invoked to protect citizens affected by the passage of state laws disregarding these constitutional limitations. Much less can the eleventh amendment be successfully pleaded as an invincible barrier to judicial inquiry whether the salutary provisions of the fourteenth amendment have been disregarded by state enactments."

The doctrine of the *Smyth vs. Ames* and *Prout vs. Starr cases,* was specifically approved and followed by Mr. Justice

White in *Gunter vs. Atlantic, etc., Co.*, 200 U. S., 273, the following language of Mr. Justice Harlan in the *Smyth case* being quoted by him (284):

> "'It is the settled doctrine of this court that a suit against individuals, for the purpose of preventing them, as officers of a state, from enforcing an unconstitutional enactment, to the injury of the rights of the plaintiff, is not a suit against the state within the meaning of that amendment.'"

And in *McNeill vs. Southern Ry. Co.*, 202 U. S., 558, Mr. Justice White, speaking for a unanimous court, said (559):

> "We think the real object of the bill may properly be said to have been the restraining of illegal interferences with the property and interstate business of the railway company, the asserted right to interfere, which it was the object of the bill to enjoin, being based upon the assumed authority of a state statute, which the bill alleged to be in violation of rights of the railway company protected by the constitution of the United States. In this aspect the suit was not, in any proper sense, one against the state."

To the same effect is *Scott vs. Donald*, 165 U. S., 107, an excise case from South Carolina arising under its dispensary law. The syllabus of the case reads:

> "An injunction to restrain executive officers of a state from continued and repeated acts of trespass in seizing and carrying away and confiscating for the use of the state the imported property of the complainant, under alleged authority of an unconstitutional statute, is not invalid on the ground that it is a proceeding against the state, or that it interferes with official discretion."

See also *Graham vs. Folsom*, 200 U. S., 248, where a *mandamus* upon officers of the state was upheld in the very teeth of a law of the state forbidding them to perform the very act ordered by the circuit court.

In *Mississippi vs. Illinois, etc., Co.*, 203 U. S., 335, the court applied the rule to the state railroad commission and held that an injunction against it was not one against the state.

We come now to the latest cases on the subject, one of them being the "Minnesota rate case," *Ex parte Young*, 209 U. S., 123. It was an original petition for a writ of *habeas corpus*, filed on behalf of Edward T. Young, attorney general of Minnesota, and was most elaborately and learnedly briefed and argued. On April 18, 1907, the state of Minnesota passed an act establishing certain maximum rates for the transportation of certain commodities between stations within the state, and ordering the officers of the various railroads in the state to put these rates into effect, and, if they failed, imposing heavy penalties upon them. The act went into effect on June 1, 1907, and on May 31, 1907, nine separate suits were commenced in the circuit court of the Minnesota district, by stockholders of various railroads praying for injunctions against their respective railroads restraining them from putting the rates into effect, and against the attorney general restraining him from enforcing any of the provisions of the Act, and from instituting any actions or proceedings against the defendant railroad companies, or any of their officers, directors, managers, agents or employees because of any failure on their part to obey the act. The reason assigned was that the act was in violation of the federal constitution. The attorney general appeared and

objected to the jurisdiction of the court, declaring the suit was in effect against the state of Minnesota. He also filed a demurrer to the bill on the same ground. The court enjoined him from taking or instituting any action or proceeding to enforce the penalties and remedies provided for by the act or to compel obedience to the act.

The day after the granting of this injunction the attorney general, in violation of its terms, filed his petition in the state court of Minnesota for an alternative writ of mandamus against the defendant railroads. The state court allowed this writ which commanded the company to comply with the act.

Upon an affidavit showing to the circuit court that the attorney general had violated its injunction, the court granted a rule upon him to show cause why he should not be punished for contempt. To this rule the attorney general answered denying, as he had before, the jurisdiction of the court and alleging the suit was in reality one against his state.

The circuit court adjudged him guilty of contempt and committed him to the custody of the marshal until he should purge himself by dismissing his mandamus suit. Hence his petition for *habeas corpus*.

This court held squarely that the Eleventh Amendment did not deprive the Circuit Court of jurisdiction.

Towards the close of the opinion delivered by Mr. Justice Peckham is found this statement, which is most pertinent to the case now at bar:

> "It must be remembered that jurisdiction of this general character has, in fact, been exercised by federal courts from the time of *Osborn vs. United States Bank* up to the present; the only difference in regard to the case of Osborn and the case in hand being that in this case the injury complained of is the threatened commencement of suits, civil or criminal, to enforce the act, instead of, as in the *Osborn case,* an actual and direct trespass upon or interference with tangible property. A bill filed to prevent the commencement of suits to enforce an unconstitutional act, under the circumstances already mentioned, is no new invention, as we have already seen. The difference between an actual and direct interference with tangible property and the enjoining of state officers from enforcing an unconstitutional act, is not of a radical nature, and does not extend, in truth, the jurisdiction of the courts over the subject matter. In the case of the interference with property the person enjoined is assuming to act in his capacity as an official of the state, and justification for his interference is claimed by reason of his position as a state official. Such official cannot so justify when acting under an unconstitutional enactment of the legislature. So, where the state official, instead of directly interfering with tangible property, is about to commence suits which have for their object the enforcement of an act which violates the federal constitution, to the great and irreparable injury of the complainants, he is seeking the same justification from the authority of the state as in other cases. The sovereignty of the state is,

in reality, no more involved in one case than in the other. The state cannot, in either case, impart to the official immunity from responsibility to the supreme authority of the United States."

This case of *Ex parte Young* seems to decide forever that a case like the one at bar is not one against the state. This question has since been passed upon by this court in several decisions in which the rule is treated as finally settled by the *Young Case*: *Scully vs. Bird*, 209 U. S., 481; *William S. Jackson, as Attorney General of New York, vs. Consolidated Gas Co. of New York*, 212 U. S., 19; *Western Union Telegraph Co. vs. Andrews*, 216 U. S., 165; *Herndon vs. Chicago, etc. Ry. Co.*, 218 U. S., 135, 155.

What duty is imposed by Chapter 67 upon the appellant and the defendants below, and is it necessary to the maintenance of this suit that a duty be imposed?

It remains to be seen what authority the several defendants in the bill may exercise under Chapter 67, and what they may exercise independently of it. In the case of *State ex rel. Haskell, Governor v. Houston*, 21 Okla., 782, decided in the supreme court of Oklahoma, it was expressly held that in some cases it was the duty and right of the governor to enforce the laws of the state, in others that of the attorney general, and in still others that of the county attorney. Under this decision and by the reading of the act itself there is some duty upon each of the appellants to enforce Chapter 67, and under it or independent of it they have torn up lines in process of construction; instituted suits in the name of the state or of some of the appellants, against persons about to engage in the piping of natural gas from the state; have

placed an interstate gas line in the hands of receivers upon the most false and frivolous charges; have patrolled the state line with armed guards instructed to tear up any gas line attempted to be laid across its border. It is expressly admitted by the Attorney General in his answer (Record, page 112) that he instituted the suit, which threw an interstate gas line into the hands of a receiver. But even if the act in question and all the other laws and decisions of Oklahoma were as silent as to conferring power upon the appellants and the defendants below to prevent the construction of our clients' lines, yet their actions clearly show that they claim to have some such power, and that they have attempted and will attempt to exercise it by instituting legal proceedings, or will, by force and violence, prevent the construction of our clients' line, to their injury and to the injury of their property and rights.

It is pertinent here to note that, in the *Young* case, the attorney general laid particular stress upon the fact that the Minnesota statute imposed upon him no express duty to enforce it. This was equally true of the Nebraska statute, yet this court in the *Smyth v. Ames and Prout v. Starr* cases, sustained injunctions against the attorney general of that state. In the *Young case*, Mr. Justice Peckham dismissed this contention of the attorney general with this statement:

> "It is also objected that as the statute does not specifically make it the duty of the attorney general (assuming he has that general right) to enforce it, he has, under such circumstances, a full general discretion whether to attempt its enforcement or not, and the court cannot interfere to control him as attorney general in the exercise of his discretion. In our view there is no interference with his discretion under the facts herein. There is no doubt that the court cannot control the ex-

ercise of the discretion of an officer. It can only direct affirmative action where the officer having some duty to perform not involving discretion, but merely ministerial in its nature, refuses or neglects to take such action. In that case the court can direct the defendant to perform this merely ministerial duty. * * * The general discretion regarding the enforcement of the laws when and as he deems appropriate is not interfered with by an injunction which restrains the state officer from taking any steps towards the enforcement of an unconstitutional enactment, to the injury of complainant. In such case no affirmative action of any nature is directed, and the officer is simply prohibited from doing an act which he had no legal right to do. An injunction to prevent him from doing that which he had no legal right to do is not an interference with the discretion of an officer."

Should the Attorney General argue that he possesses authority under the common law or any alleged unwritten law of the State of Oklahoma to prevent these appellee companies from transporting natural gas out of the state and from crossing the highways beneath the surface for that purpose, we reply,—

(a) Any principle of the common law of Oklahoma, if such exist, which authorizes such a prohibition of interstate commerce is just as directly in violation of the Federal Constitution and just as utterly void and of no effect, as a statute containing an express provision to that effect; and the enforcement of any such principle, whether through the courts of the State or otherwise, would just as seriously deprive the appellees of their rights under the Federal Constitution, and may with equal authority be restrained by injunction against the officers who attempt to enforce it.

That a principle of the common law of the State which is inconsistent with the Federal Constitution is just as void as a statute is clearly set forth in the recent case of *Western Union Telegraph Company vs. Commercial Milling Company* 218 U. S., 406, 416-417 (Nov. 28th, 1910). In the opinion of the court in this case Mr. Justice McKenna said:

> "We have seen that one division of the Supreme Court of the State was of the view that if the prohibition rested on the common law its validity could not be questioned. We cannot concede such effect to the common law and deny it to a statute. Both are rules of conduct proceeding from the supreme power of the State. That one is unwritten and the other written can make no difference in their validity or effect. The common law did not become a part of the laws of the States of its own vigor. It has been adopted by constitutional provision, by statute or decision, and we may say in passing, is not the same in all particulars in all the States. But however adopted, it expresses the policy of the State for the time being only and is subject to change by the power that adopted it. How then can it have an efficacy that the statute changing it does not possess?"

(b) The authority of the Attorney General of Oklahoma is defined in the recent decision of the Supreme Court of Oklahoma:

State ex rel. Haskell vs. Houston, 21 Okla. 782, 97 Pac. 982 (1908):

The syllabus prepared by the court states the ruling in that case as follows:

> "Under Wilson's Rev. & Ann. St. Okl. 1903, Sec. 6567, the Attorney General has no power to

bring suit in the name of the state, or prosecute or defend the same in the district courts of the state, in any civil or criminal cause in which the state may be a party or interested, except when requested by the Governor or either branch of the Legislature."

The Circuit Court had jurisdiction even if Chapter 67 had never been enacted.

In view of the acts committed by the defendants to the bill and those which they threaten to commit, acts which will totally destroy our clients' lines and property and the commerce in which they propose to engage, the circuit court had jurisdiction over the appellants even had Chapter 67 never been passed. This for the reason that the United States is a sovereign nation vested with powers in the exercise of which it alone is omnipotent and before which no man or state can stand. The colonists, while they possessed these powers, were given up to selfish strife, one with another, which headed them straight to destruction. By mutual agreement they created a nation and surrendered these powers to it. Take them away and we have again the confederacy which no one wants, and we take them away when we deny to the nation authority in its judiciary to protect it from encroachments which threaten the very existence of these powers. Idle would it be to vest the nation with certain enumerated powers and then withhold from it the right to defend these powers from usurpation. Certain it is that the framers of the Constitution did not intend to do such an obviously useless thing. They had seen the Confederacy fail for want of inherent power within itself, and we are safe in concluding that they proposed creating a nation and drafting a constitution, which gave to that

nation at least the power to repel any attack or encroachment made upon any of its sovereign powers, even the meanest, if we may call one power under the Constitution of more moment than another. If these state officials should believe that the carrying of the mails in Oklahoma could best be done under state laws, will any sane man deny the right of the federal judiciary to restrain all interference by them with the United States mails, even if there were no express statute of the state authorizing their intermeddling? Or, if they should believe all banking in Oklahoma could best be conducted by local banks and should attempt to prevent national banking houses from existing in the state, and prevent the erection of others, would any one deny to the national banks the right to apply to the federal court for relief and protection, even if there were no state statute expressly authorizing the officials to so act? When in Chicago mob violence attacked the railroads carrying mails and interstate commerce, and the president abated it with the strong arm of the police power of the nation in the shape of its standing army, did this court in *In re Debs,* 158 U. S., 564, deny to the judiciary the power to protect the nation's mails and commerce?

Neither the railroads nor the mails of the country are under the peculiar protection of the constitution any more than are our clients' pipe lines; each is in its peculiar way, a vehicle of interstate commerce and within the exclusive power, regulation and protection of Congress, and when the power over them—a national prerogative—is attacked by these appellants, we say the nation, through its judiciary, may restrain them whether they act under a statute of the state or not. They have attacked one of the vital powers of the nation and the nation may defend itself whether the act is undertaken as state officials without express authority from the state, or as

state officials expressly directed so to act under Chapter 67, or any other state law of Oklahoma.

A state acts only through its legislature. If, then, state officials expressly empowered and directed by unconstitutional legislative enactment, may be restrained, how much more readily may they be enjoined, if they voluntarily and not under direction of their legislature, act against the constitution. Clearly a suit against state officials, voluntarily and without color of legislative authority unconstitutionally interfering with interstate commerce, is not as much of a suit against their state as where they commit those acts in obedience to the express provisions of an unconstitutional statute of their state. If the latter does not offend against the Eleventh Amendment, surely the former does not.

The right to engage in interstate commerce is granted by the Federal Constitution and the federal courts have jurisdiction to protect such right and restrain interference with its exercise.

Some minor questions.

There still remain some minor questions arising under this last proposition which require attention.

1. **Does the fact that one of the appellants is the Governor of Oklahoma exempt him from suit and restraint?**

The *Young* and other like cases were leveled against attorneys general. The case at bar aims at a governor. Is there any distinction? No. When a citizen of the Union is attacked in any of the rights preserved to him under the Federal Constitution, the offender, be he a constable, an attorney general or a governor, cannot don his official robes and shelter himself under an unconstitutional state law. In such a case the offending official is sued as an individual, is heard as an individual and will be enjoined as an individual.

In *Scott vs. Donald*, 165 U. S., 110, the person restrained was a constable. He defended, however, as an executive officer of the state, but was enjoined. In the cases of *Ex parte Young*, 209 U. S., 123, *Smith vs. Ames*, 169 U. S., 466, and *Prout vs. Starr*, 188 U. S., 537, the respondents were attorneys general of their respective states and defended as such, but were enjoined. In *Davis vs. Gray*, 83 U. S., 203, Davis was the governor of Texas, but nevertheless he was enjoined as such. In truth, the governor is but an executive officer and as such enjoys no greater right to violate the constitution of our country than the meanest citizen within his state. In the *Davis case* the court, in speaking of writs against state executive officers, said:

> "In the application of this principle there is no difference between the Governor of a state and officers of a state of lower grades. In this respect they are upon a footing of equality."

In *Marbury vs. Madison*, 1 Cranch, 137, 170, Chief Justice Marshall said:

> "It is not by the office of the person to whom the suit is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined."

In the *Davis case* this court cited the case of *State vs. Whiteman*, 5 Ohio St., 528. This was an application for the allowance of a peremptory mandamus. The first syllabus of the case reads:

> "Although the governor, in the exercise of the supreme executive power of the state, may, from the nature of his authority, have a discretion which cannot be controlled by judicial power, yet, in regard to a ministerial act which might have been devolved on any other officer of the state, and affecting any specific private right, he may be made amenable to the compulsory process of the court by mandamus."

In *Noble vs. Union River Logging Company*, 147 U. S., 165, and *Garfield vs. Allison*, 211 U. S., 264, writs were allowed against the Honorable Secretary of the Interior.

We may safely conclude, then, that when a governor trespasses unlawfully upon the constitutional rights of an American citizen, he is as amenable to the law as the lowest executive officer in his state.

2. The bill in the second paragraph of its body recites the state office which each of the appellants holds. Does this make it suit against the state?

But, perhaps, the recital in the second paragraph of the appellees' bills (Record, pp. 2, 35, 68) of the office which each of the respondents holds in the state machinery of Oklahoma may raise a doubt as to this being a suit against the respondents in their individual capacity. If so, the case of *Ex*

parte Young. (209 U. S., 123), will immediately dispel it, for there the case is entitled against the respondent, Edward T. Young, in his individual capacity. The same course is followed in entitling the bill in the case at bar. In that portion of the bill in the *Young case* wherein, in compliance with Equity Rule 20, the pleader recites the names and citizenship of the parties complainant and respondent, nothing appears indicating the office held by Mr. Young. He is sued as an individual and described as an individual. A like course was pursued in the bills filed herein. It is not until we come to the second paragraph of the *Young* bill that we find he is attorney general of the state of Minnesota. That part of the bill which so describes him reads as follows:

> "The defendant, Edward T. Young, is Attorney General of the state of Minnesota, duly elected and acting as such as provided by the constitution and laws of said state."

The frame of the bills filed in the case at bar conforms to the draft of the Young bill. It is not until the second paragraph is reached that the official position held by the several respondents is disclosed.

Clearly this is not a suit against the state of Oklahoma, and may be maintained.

3. Review of the authorities relied upon by appellants.

The appellants rely upon the cases of *in re Ayres*, (123 U. S., 443), and *Fitts vs. McGhee*, 172 U. S., 516; but these cases lay down no different doctrine. In the argument of the *Young* case before this court, both in his oral and his written arguments, Attorney General Hadley, who assisted

Attorney General Young, laid great stress upon these two cases; but this court repudiated both of them. The statute attacked in the *Ayres case* was held to be constitutional, and the bill itself disclosed the fact that it was filed against the state of Virginia for specific performance of its contracts. In the *Fitts case* a bill reducing tolls over a bridge had been passed by the legislature of Alabama. The act declared a forfeiture of twenty dollars to each passenger charged a higher rate than that fixed in the act, and provided for a recovery of the same before a justice of the peace. No duty was imposed upon the attorney general and he never took a step, either in his official or his private capacity, to enforce the act. Within five days after the passage of the act the bill of complaint was filed. In dire distress for a reason for joining the attorney general, the complainant charged that a duty was imposed upon him by another and separate statute, which, however, this court found constitutional. Clearly, the attorney general of Alabama had nothing whatever to do with the tolls in question. The remedy provided by the act was a private action by the traveler crossing the bridge. With this the attorney general had no concern. A court of law was, in the *Fitts* case, transformed into a moot court. As Mr. Justice Peckham in the *Young* case puts it, as well might the complainant join the superintendent of schools.

The circuit court had jurisdiction in this case.

E. L. Scarritt,
John J. Jones,
John G. Johnson,
D. T. Watson,
Attorneys for Appellees.

Office Supreme Court, U. S.
FILED.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

No. 916

CHARLES WEST, Attorney-General of the State of Oklahoma,

vs.

THE KANSAS NATURAL GAS COMPANY, et al.

MOTION AND REPLY BRIEF OF DEFENDANTS IN ERROR ON QUESTION OF CONSERVATION.

JOHN G. JOHNSON,
D. T. WATSON,
Attorneys for Defendants in Error.

Smith Bros. Co. Inc., Franklin Print, 412 Grant Street, Pittsburgh, Pa.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

No. 916

CHARLES WEST, Attorney-General of the State of Oklahoma,

vs.

THE KANSAS NATURAL GAS COMPANY, et al.

Motion.

And now come John G. Johnson and D. T. Watson, attorneys for the appellees, and for the reasons herein given, ask leave to file the accompanying brief reply to the statements of the Attorney-General, made in his closing argument as to the conditions existing in Oklahoma, requiring the conservation of gas for Oklahoma alone.

.....

.....

Reasons Why the Motion Should be Granted.

This case was argued in April, 1909, in the court below on demurrers to the Bills of the present appellees and an opinion filed awarding a preliminary injunction on July 3, 1909. Nothing further was done until the Attorney-General's Answer was filed on February 1, 1911, and a final decree entered without argument on the same day in pursuance of the stipulation. (Rec. 104).

The statements as to conservation of natural gas in Oklahoma made in the closing argument of the Attorney-General in this court were not discussed in the opening argument in this case,—were not discussed in the opinion of the court below, and the appellees never have had an opportunity to reply to them.

The advancement of the case and the fact that the Attorney-General's brief was not filed until March 30th, and we did not receive a copy of it until March 31st, when the argument was set for April 3, 1911, rendered it impossible for us to reply to the contentions in our brief in this Court.

FACTS AS TO NATURAL GAS.

(References are to pages of Record).

The case was argued in Muskogee, Oklahoma, before judges who had intimate knowledge of the natural gas situation in Oklahoma.

Since the argument the Circuit Court of Appeals for the Eighth Circuit has affirmed the principles enunciated in the opinion of the Court below in this case.

(*Haskell et al. vs. Cowham*, appeal from the Circuit Court for the Eastern District of Oklahoma, decided April 7, 1911).

Oklahoma does not present a case peculiarly calling for the conservation of its natural gas. There are at present drilled in Oklahoma 273 commercial gas wells capable of furnishing 1,225,000,000 cubic feet of gas per day (106). The present daily consumption of natural gas in Oklahoma is 215,000,000 cubic feet of natural gas per day (107).

The surplus of production over consumption in Oklahoma is 1,010,000,000 cubic feet per day, and this contradicts the Attorney-General's allegation that the *legitimate* demand for gas exceeds the supply.

The discovery of new fields of natural gas is yet quite probable, and, as stated by the Attorney-General in his oral argument before this Court, since the filing of the bill in this case a new field—the Collins Field—has been discovered.

Oklahoma does not seek to regulate the quantity of gas any one owner may take from his well. This was done in Kansas by the enactment of a statute forbidding the taking from a gas well of more than fifty per cent of its daily capacity: Chapter 313 of Laws of Kansas, 1909, about the middle of page 523.

Section 67 does not pretend to prevent *waste* of gas, or restrict the quantity of gas taken from wells, or regulate the PRODUCTION of gas in any manner, or restrict its transportation except by a prohibition of its being piped out of the state.

The Act of March 27, 1909 (Appellant's Brief, p. 27), does seek to prevent waste in production, and it is not even alleged in this case that any of the appellees ever violated any of its provisions.

There is no averment in either Bill or Answer as to the size of appellees' pipes, and neither Chapter 67 of the Laws of 1907-1908 nor the Act of March 27, 1909, limits the size of pipes to be used in transporting natural gas.

Oklahoma, while prohibiting the transportation of its own gas, is receiving daily supplies from Kansas and Arkansas by pipe lines, and the citizens of the state of Oklahoma are using the same:

Section 18 of Bill (p. 10);

Not denied, Section 18 of Answer (p. 113).

The possible exhaustion of the natural gas supply in a very few years is not averred as a fact but merely the "belief of the Attorney-General." It is merely a conjecture or conclusion of the Attorney-General; such conclusion is not well pleaded, there being no statistics or other specific facts averred from which this Court might draw such a conclusion (107).

The averments of the Answer (107) that "the legitimate demands" exceed the supply and that at the present consumption gas will be exhausted "in a very few years," and others of like nature are equivocal—uncertain and mere conclusions of the Attorney-General.

No owner of gas wells is complaining of our gas line, and the averment of damage and injury from our lines is entirely consistent with a legitimate use by us of the gas field (108). If we violate the lawful provisions as to waste, etc., the law will compel us to observe them.

The averment (109) of effect of our larger line is not that as a fact it will prevent future development in the state of domestic gas lines for cities, but merely is the statement of a conclusion that *"in reason"* such result will follow, while the facts averred do not justify the conclusion.

Larger pipe lines could easily be laid for the cities.

The injurious effects from the alleged erection of large pumping stations outside of Oklahoma as averred (109) is argumentative and is merely averred as possible and not as a fact. If such pumps when erected in the future have an illegal and wrongful effect or any other wrongful act is done by appellees, Oklahoma has, in the Federal courts when the case may arise, an adequate remedy even if the pumps are out of the state:

Georgia vs. Tennessee Copper Co., 206 U. S., 230.

Oklahoma could have filed, and still can file, a cross-bill in this very proceeding, to prevent any alleged unfair use of pumps.

The Attorney-General's theories as to gas, its production, etc., given in his closing argument, are not, so far as the Record shows, supported by facts.

The averment (109) that the only—

"natural practical usable fuel"

for Oklahoma is natural gas is based on the preceding allegations in that section and is not supported by them.

OKLAHOMA IS NOT DEPENDENT ON NATURAL GAS FOR ITS FUEL SUPPLY.

It has coal, oil and gas (109).

It was admitted by the Attorney-General in his oral argument that all of these exist in large quantities, and that coal has been and is being shipped from Oklahoma into Kansas.

It allows its oil to be pumped out of the state without even attempting to use it for a fuel (109).

Its coal supply is not being exhausted but only growing—
"more costly to produce." (109)

Many Western states—some of them "prairie" states—depend on the coal and coke and natural gas from other states.

Nebraska is a "prairie" state, without timber, and contains no deposits of coal.

According to the United States Geological Survey for 1908, pages 29 to 30, the estimated quantities of the available deposits of coal in Oklahoma and adjacent states were as follows:

Oklahoma,	79,213,800,000	short tons.
Missouri,	39,849,000,000	" "
Kansas,	6,876,000,000	" "
Iowa,	28,937,000,000	" "
South Dakota,	10,000,000,000	" "

NO PRACTICABLE SUBSTITUTE FOR PIPE LINES.

The appellant in his Answer admits that—

"the transportation by pipe lines is the only method of transportation now usually availed of." (111)

Appellant does not aver or even suggest any other practicable method of transporting natural gas; he does not aver any facts which would show the cost of any other method or the amount or the value of the gas which could be transported by such method.

The Attorney-General admits that the pipe line is the only method in use and that there are over 5,000 miles of such pipe lines employed for the transportation of natural gas in the United States and Canada (6, 111); the averment of his Answer which suggests that other methods might be used, but does not specify or describe them, or show that they are practicable, is, therefore, pure conjecture.

The Attorney-General also admits that there are in Oklahoma 500 miles of natural gas pipe lines which

"often at great length run over, along and across the public highways of the state; that the same are operated without hurt, hindrance, damage or inconvenience to the travelling public or to abutting property owners." (7, 111).

CHARGE AS TO PUMPS.

It is a fact, and the Attorney-General admitted in his oral argument, that the gas flows naturally from the wells at a high pressure, which carries the gas along our lines until its force is gradually reduced by friction. When this pressure falls to such a point that it will not practicably carry the gas further, compression stations, erroneously called pumping stations, are erected, which compress the gas, restoring its original high pressure. These stations are ordinarily erected about fifty miles apart and three of them are necessary to get our gas to Kansas City and St. Joseph, Missouri. These compression stations create no suction upon the wells or lines. They perform somewhat the same service upon the gas being transported as locomotives do upon a railroad, only they are stationary, and instead of *pulling* their loads of gas, they *push* it along. If Oklahoma desired to forbid any artificial method of accelerating the flow of gas from the wells it could have been done most easily. Kansas by legislative enactment forbids the use of artificial apparatus to increase the natural flow of gas from wells: Chapter 312, Laws of Kansas, 1909, page 520. To this Act the Kansas Natural Gas Company has no objection.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1910

CHARLES WEST, Attorney General of the State of Oklahoma, *Appellant*

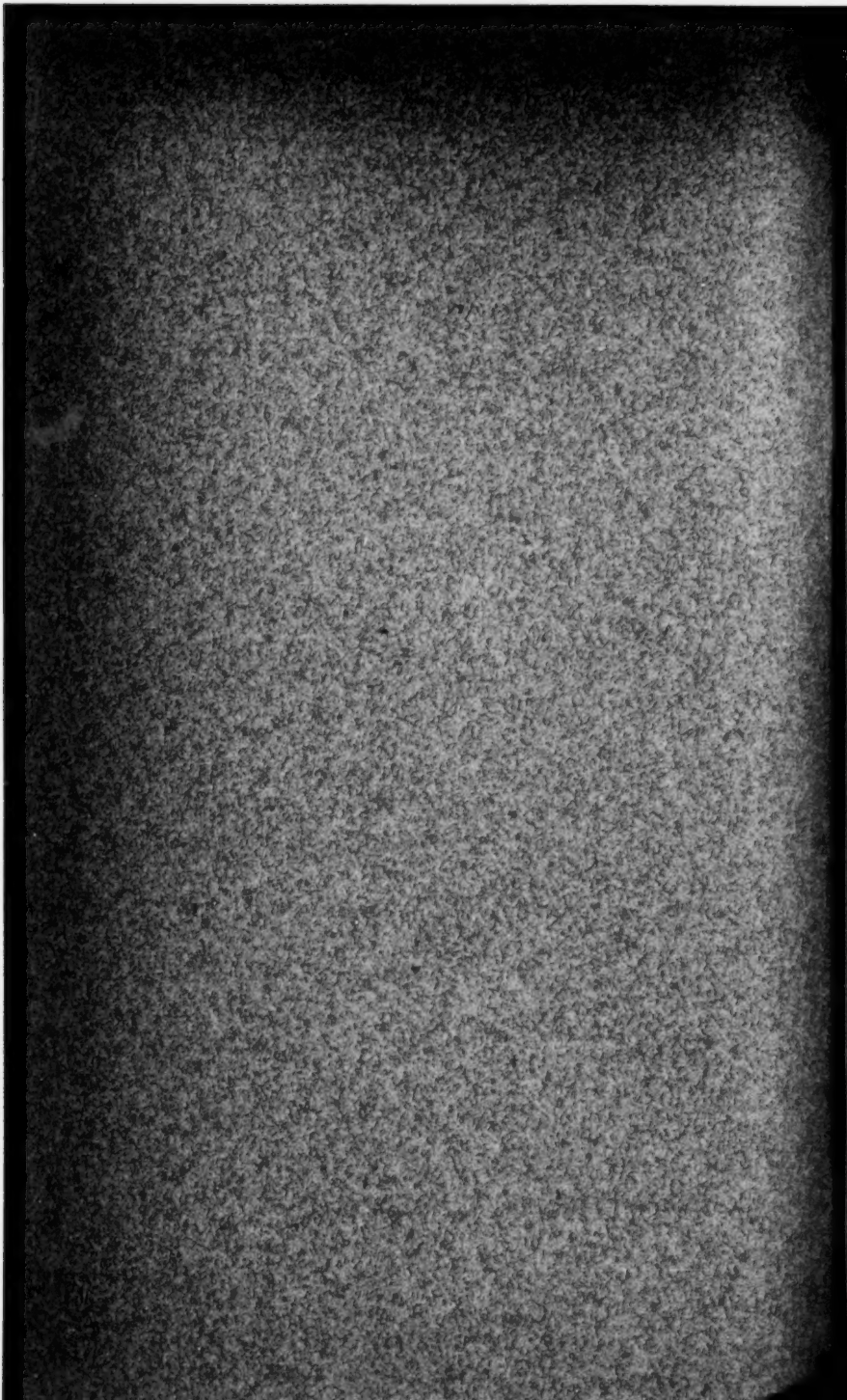
vs.

KANSAS NATURAL GAS COMPANY et al, *Appellees*

No. 916.

Appellant's Reply to Motion and Reply Brief of Appellees

CHAS WEST,
C. B. AMES,
Attorneys for Appellant.



IN THE

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October Term, 1910

CHARLES WEST, Attorney General of the State of Oklahoma
Appellant

vs.

KANSAS NATURAL GAS COMPANY et al
Appellees

No. 916.

REPLY TO MOTION OF APPELLEES.

Now come Charles West and C. B. Ames, attorneys for the appellant and for their reply to the motion of the attorneys for the appellees for leave to file an additional brief in said cause respectfully state to the court that they have no objection to said motion being granted, provided the court

will consider the reply to said motion, which is hereunto attached.

CHARLES WEST,
C. B. AMES,
Attorneys for Appellees.

On page 2 of the motion, it is stated that the case was argued in April, 1909, on demurrer and that nothing further was done until the Attorney General's answer was filed February 1, 1911.

By reference to printed pages 104 and 141 of the record, it will be seen from the stipulations that prior to the 1st day of February, all of the defendants had answered in the causes and that the attorney General on that day filed his separate amended answer to the bills and that all of the other defendants withdrew their answers, and that all of the other pleadings and records in the cause, other than those embraced in the stipulations, were to be omitted from the record.

It is manifest from these stipulations, therefore, that various conferences had been had between counsel, because by the very stipulation under which the Attorney General filed his amended answer, the complainants agreed to set

the cause down for hearing on bill and answer, which, of course, would have been impossible unless they had known the contents of the answer.

The statement, therefore, that nothing was done from the time of the demurrer until the amended answer was filed, is flatly contradicted by the record.

The next statement on page 2 of the motion is that the question of conservation was raised at a time when the appellees had no opportunity to reply.

This statement is likewise flatly contradicted by the record and the facts.

It is true that the opinion of the Court rendered on demurrer does not discuss this doctrine. This was because the question was not raised by the demurrer. The facts on which it is based were not alleged in the bill, but by the answer, and it is of course true that the appellees were fully aware of the contents of the answer before it was filed as is shown by the stipulation referred to.

The answer raised the question of conservation as fully and as clearly and in as precise terms as it was possible to do so, and of course, counsel must have known the contents of the answer.

In addition to this, our briefs were in the hands of counsel for the appellees five days prior to the argument, which is a longer time than that elapsing between the argument and the time when notice of this motion was served.

In addition to this, the motion to advance (of which appellees had actual knowledge prior to the 27th day of February, 1911), on which date they filed their objections to it, sets out clearly the conservation theory.

In their objection to advancement of the case the appellees say on the very first page "the only reason assigned for its advancement is that otherwise the supply of natural gas in Oklahoma, the subject-matter of the controversy will be exhausted," and they then proceed to argue the conservation theory.

In addition to this we remind the Court that the question of conservation was discussed in the opening argument before the Court. We particularly remember the fact that the question was suggested by Mr. Justice Holmes and the statement made by counsel in the opening argument that the Hudson County Water Co. case was regarded by us as very material in the case at bar and that Mr. Justice Holmes at that time sent for the volume containing that opinion, and counsel making the opening argument at the conclusion of his argument stated that the Attorney General would discuss this particular question further.

It thus appears that this statement of counsel for the appellees is not in accordance with the record or the facts.

The next statement in the motion on page 2 is that the case was argued at Muskogee before judges who had intimate knowledge of the natural gas situation.

The stipulations to which we have previously referred show that the case was submitted on bill and answer without argument. The argument on the demurrer did not raise this question because it first comes into the record by reason of the averments of the answer and is not suggested on the face of the bill.

It is next stated on page 3 that the production is 1,225,000,000 cubic feet per day and the consumption 215,000,000 and that therefore there is a surplus of production of 1,010,000,000.

These figures are correct, but the statement that there is a surplus is flatly contradicted by the record.

The whole answer continually denies that there is any surplus of production over consumption, particularly the al-

legations on pages 106 and 107 and we invite attention to those pages and quote the following from the bottom of page 107:

> "There have been many wells drilled in the State of Oklahoma having an initial capacity of from one to ten million feet per day which have within one to three years declined to a daily capacity of approximately 100,000 feet per day, and I aver that while the present daily capacity of the gas wells of the State is approximately one and one quarter billion feet per day, that the present daily consumption is more than can be safely taken from said wells without rapidly destroying their efficiency and depleting this great natural resource of the State."

It will be noted that Kansas, which prohibits a taking of more than 50% of the daily potential capacity of a well has found even that limit too high. Its wells are now exhausted. The best opinion is that not more than 10% of the potential capacity can be used constantly. Yet Oklahoma is now using 20% daily.

The next statement on page 3 of the motion is that the Attorney General in his oral argument stated that the Collins field is a new field, discovered since the filing of the bill.

This statement is simply a mistake, as there is no such field as the Collins field and the Collinsville field was dis-

covered prior to the filing of the bill, and the Attorney General made no statement which can possibly justify this averment of the motion. No new fields have been discovered in the last four years.

The next statement in the motion, page 3, is that Oklahoma does not seek to regulate the quantity of gas any owner may take from his well, while Kansas does by a 50% statute.

The insufficiency of this act of Kansas is demonstrated by the fact, as averred in the bill and admitted in the answer, that the Kansas field is practically exhausted and that its life was shorter than the life of any other known gas field.

On printed page 4 of the record the bill avers at the end of the 5th paragraph:

> "Said gas trunk pipe lines are unable to meet the increasing demand and there has been and now is a shortage of natural gas therein, and your orator charges that if it be permitted to construct its line hereinafter referred to the gas which it will transport through the same will largely meet and supply such shortage." (Meaning Kansas.)

The fifth paragraph of the answer at page 107 of the record says:

> "I admit that there is now a shortage of gas in the

state of Kansas and aver that said shortage has been largely caused by the transportation of gas by the complainant and others from the gas fields into the larger cities of Kansas and Missouri, and that such transportation has seriously impaired the life and value of the Kansas natural gas supply."

Oklahoma does seek to regulate the quantity of gas any owner may take by requiring gas wells not in use to be capped; by regulating pumping; by various prohibitions against the waste of gas and if the court will examine the statutes set out in our original brief the various efforts of the state will be observed.

At the oral argument, and again in this motion, counsel express themselves as being willing to obey the act of March 27, 1909, and yet in the decree on page 134, they took a permanent injunction restraining the officers of the state from in any way interfering with the laying, building and construction of their pipe lines by reason of chapter 67, or by reason of *any other statute* of said state or any common law right, or unwritten law whatsoever, so that by their very confession made in open court their decree is too broad.

Comment is made on page 4 of the failure to deny that Oklahoma is receiving gas from Kansas and Arkansas It appears from the record that the supply of Kansas gas is already insufficient for its own demands, and therefore the claim that we were receiving gas from that state cannot be material.

In Bulletin 394 issued by the United States Geological Survey on page 54, it appears that the production of natural gas in Arkansas and Wyoming together in 1906 was only 58,500 M. cubic feet as against 1,446,879 M. cubic feet in Oklahoma for the same year, so that it is apparent that if Oklahoma takes anything from these states, it is an insignificant quantity.

It is next asserted on page 4 of the motion that the Attorney General merely alleges that it is his belief or conjecture that the gas supply will be exhausted in a few years, but if the Court will examine the bottom of printed page 107 (at the top of marginal page 189) it will be observed that there is a specific averment "that the present daily consumption is more than can be safely taken from said wells without rapidly destroying their efficiency and depleting this great natural resource of the state," and while it is true that just prior to this averment the Attorney General says that

he believes if the complainants are permitted to construct their pipe lines, that the Oklahoma gas will be exhausted in a very few years.

This belief is the result of the facts stated in the preceding paragraph that the complainants have actually already exhausted the supply in Kansas.

Comment is next made, on page 4, that no owner of a gas well is complaining of appellees' line.

It, of course, is evident that the legislature would not have passed all of these gas acts except in response to the will of the people interested, and in this connection we call attention to the only case on this subject with which we are familiar.

Hague v. Wheeler, 157 Pa. 324, 27 Atl. 714, cited by Mr. Justice White in the Ohio Oil Co. case, which holds that the public has the right to conserve this common gas supply, though an individual cannot do so without public authority.

It is next stated at the top of page 5 that the effect of the averments of the answer is not to show that the consruction of the larger line of the appellee will prevent future development, but merely that it will *"IN REASON"* do so.

The answer sets up the facts on which this statement is based. They are, that the gas field is in four counties, that there are pipe lines entering this field from the East, South, Southwest and the North; that each of them is pressing further into these fields and that if these relatively larger lines of the appellees are constructed towards the South, that these other lines in order to procure their supply of gas will have to extend towards the center and after setting up these facts and by reason of them, the answer avers that *in reason* there will be no future development, because the owners of the pipe lines know that the field will be so soon destroyed, and in the very nature of things, the Court will know that where a very large pipe line is forcing its gas through by heavy pumps, creating a vacuum in the wells, that the supply from the common reservoir will flow towards this vacuum, thus taking the legitimate flow from the other pipe line companies which by the state laws are prohibited from a like use of pumps, thus putting them at the mercy of the larger line

It is next stated on page 5 that the injurious effects from the location of large pumps outside of Oklahoma, as averred, is merely argumentative and averred as possible and not as a fact.

This statement is not borne out by the record. On printed page 109, the Attorney General avers in his answer that because plaintiff may outside the State of Oklahoma erect enormous pumping stations which they are now actually in the process of constructing, *they might reasonably and would inevitably render entirely useless all the present lines in Oklahoma* and take away from the towns and cities of Oklahoma the entire practical use of their sole and natural fuel, because when gas is removed by the limited, prudent and natural rock pressure the nature and formation of the gas and oil sand is not radically changed, but if large pumps to pump out the wells out of proportion to the rock pressure are used as are now actually threatened by the plaintiff, the gas and oil sand is actually broken down as though shot with dynamite or other violence, and the salt water thereunder, always to be found, at once drowns out the wells, where rock pressure has been too greatly or rapidly decreased.

In this same paragraph counsel then say that if such pumps have an illegal or wrongful effect or any other wrongful act is done by appellees, Oklahoma would have an adequate remedy in the federal court, citing Georgia v. Tennessee Copper Co., 206 U. S. 230, where resort was had to this court in an original proceeding, and in the very next paragraph, it is stated that

> "Oklahoma could have filed, and still can file a cross-bill in this very proceeding to prevent any alleged unfair use of pumps."

This admission of a remedy in court is in direct conflict with the prayer of the bill and the relief which has been obtained, because the only question involved in this case is whether the said officers should be enjoined from asserting any right in the state courts.

And furthermore if there is a remedy to the state by litigation, there must also be a remedy by legislation reaching its territorial limits, as was pointed out by this court in Hudson County Water Co. v. McCarter, 209 U. S. 349. This admission destroys the whole case of the appellees.

At the bottom of page 5 it is argued that Oklahoma is not dependent on natural gas because it has coal and oil in addition.

We have dwelt upon the fact in the argument that the very law here under review seeking to preserve the gas is necessary to preserve the oil because of the fact that oil and gas are in the same sand and that the acts of the appellee will destroy the sand, so that while it is true Oklahoma has a valuable oil deposit in order to preserve that deposit, it is necessary at the same time to preserve the gas.

As to the coal, it is alleged in the answer at page 109:

> "That because of its generally prairie character said State is entirely without a domestic fuel except coal and natural gas and that its supply of coal is growing rapidly more costly to produce because of the peculiar nature of the Oklahoma mines—their great depth, bad floors and ceilings, bad inclines, great dryness and presence of noxious and dangerous gases";

It is stated in the motion that the Attorney General in his oral argument admitted that coal was being shipped from Oklahoma into Kansas. The memory of counsel is in error on this point. The Attorney General did state that some coal was being shipped into Northern Texas, but we understand the fact is that 99 per cent. of the coal produced in

Oklahoma is being consumed in the State and in extreme Northern Texas.

It was impossible that the Attorney General made the statement that there was an adequate supply of coal or that the supply was growing, because at the end of 1908 he made a personal investigation of the coal mines, going down into the principal workings, and thereafter in his annual report to the Governor, used these words with reference to that matter:

> "It is clear that the time of the cheapest coal, so far as the fields already known are concerned, has passed. The croppings have been worked down, and the mines have become worked out to such an extent that from now on it must be expected that coal will cost more than it has in the past, provided the same system of mining is followed. In fact, I am informed by persons who ought to know, that the time has come now when if one takes into consideration the price at which competiting coal is sold, for instance, that from Illinois, Missouri or Kansas, if the Oklahoma coal should be sold at a higher figure, competing coal on the one hand will keep it from going higher, and that the cost of production on the other will cut the margin between the present market price and the cost smaller and smaller continually. From what I have seen I am inclined to believe that this is true, and that some new means or method of coal mining must be resorted to."

Outside of the facts in the record, we understand the fact to be that the Oklahoma mines produced from July 1, 1908 to June 30, 1909, 3003,110 tons; in the next year, July 1, 1909 to June 30, 1910, the Oklahoma mines produced

3,113,431 tons; the figures for the current year have not been compiled yet, but little or no mining is done beyond the 1st of March, and the amount of coal produced from July 1, 1910 to March 1, 1911 was 1,000,736, so that it is apparent that the production of coal this year compared to the last year and the year before will be from one-third to one-sixth short.

It is next claimed on page 6 of the motion that the Attorney General admits that "the transportation by pipe lines is the only method of transportation now usually availed of", and it is therefore argued that there is no practical substitute for pipe lines.

We desire to quote the following from the Attorney General's answer on page 111 of the printed record:

> "This defendant admits that the transportation of natural gas by means of pipe lines has been and now is extensively carried on in states named in the Thirteenth paragraph of the bill, but he is not informed as to the number or milage of said pipe lines. He admits that the same has grown into a great industry and admits that millions of dollars are invested therein and he admits the transportation by pipe lines is the only method of transportation now usually availed of but this fact is due to the cheapness of transportation by such means as compared to any

other kind of transportation and the competition is thus restricted at this time to transportation of natural gas by pipe lines in that transportation by any other means at the present rate of transporation would not in most instances place the commodity in the market at a price sufficiently low to meet competition with coal, oil and other fuel products, and that the restrictions to pipe line is therefore caused by the cheap price at which natural gas may be transported from other places to any market, *and this respondent respectfully avers that the highways of Oklahoma are open to the transportation of natural gas by any means or method which does not make a permanent appropriation of any part of the highways by placing a plant in the same and that nothing in the laws of Oklahoma, nor the acts of this respondent nor purposed by him in any way interferes or hinders the transportation of natural gas by any proper highway use without placing a plant in the same.*"

On the seventh page it is said with reference to pumps:

> "These compression stations create no suction upon the wells or lines."

This statement is in direct conflict with the record as will appear from the following averment of the answer on page 109, which is admitted by the appelles:

> "That because plaintiff may outside the State of Oklahoma erect enormous pumping stations which

they **are now** actually in the process of constructing, they might reasonably and would inevitably render entirely useless all the present lines in Oklahoma and take away from the towns and cities of Oklahoma the entire practical use of their sole and natural fuel, because when gas is removed by the limited, prudent and natural rock pressure the nature and formation of the gas and oil sand is not radically changed, but if large pumps to pump out the wells out of proportion to the rock pressure are used, as are now actually threatened by the plaintiff, the gas and oil sand is actually broken down as though shot with dynamite or other violence, and the salt water thereunder, always to be found, at once drowns out the wells, where rock presure has been too greatly or rapidly decreased."

See also the reference on pages 59 and 60 of our brief to the United States Geological Survey for 1908.

We content ourselves here with this quotation from the record and refer the court to our brief where it is fully discussed.

We urge as inevitably conclusive of this case against the appellees the following:

ADMISSIONS IN THIS MOTION.

1. **That if the pumps in Kansas injure in Oklahoma then there is a remedy by litigation** *yet denying that there is such remedy by legislation.*

2. **That for such injury a cross bill will lie in this very suit,** *yet seeking to enjoin us from all suits.*

And the following.

ADMISSIONS ON THE ORAL ARGUMENT.

3. **That there is no complaint as to anything but the law of 1907-8,** *yet enjoining us from suing under any law.*

4. **That longitudinal crossing of highways may be prohibited,** *yet denying that latitudinal crossing may be likewise stopped.*

5. **That the amount of gas that each person may take may be limited by law,** *yet that a law limiting the taking to the territorial limits of the state is void.*

Respectfully submitted,

CHAS WEST,
C. B. AMES,
Attorneys for Appellant.

FILED.
APR 4 1911
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1910.

No. 916.

CHARLES WEST, Attorney General of the State of Oklahoma,

vs.

THE KANSAS NATURAL GAS COMPANY, THE MARNET MINING COMPANY, and A. W. LEWIS.

Appeal from the Circuit Court of the United States for the Eastern District of Oklahoma.

OPINION OF THE CIRCUIT COURT

(Awarding Preliminary Injunction, July 3rd, 1909.)

Smith Bros. Co. Inc., Franklin Print, 412 Grant Street, Pittsburgh, Pa.

Supreme Court of the United States

OCTOBER TERM, 1910.

No. 916.

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Appeal from the Circuit Court of the United States for the Eastern District of Oklahoma.

OPINION OF THE CIRCUIT COURT.

(Reported *sub nom. Kansas Natural Gas Co. vs. Haskell et al.*, in 172 Fed., 545.)

Note—As the opinion of the court below is not included in the printed transcript of record, the appellees print the same herein, for the convenience of the court.

POLLOCK and CAMPBELL, District Judges. The scope of each of the foregoing bills being identical, and the object and purpose sought to be accomplished thereby being the same, the cases will be considered together, as they have been argued, briefed, and submitted for decision in that manner. The facts necessary to a decision of the questions involved may be stated, as follows:

At its regular 1907 session the Legislature of this state passed an act, the same being chapter 67, p. 586, of the Laws for the Year 1907, which provides as follows:

"Chapter 67.

"Pipe Lines. Regulating Gas and Oil Pipe Lines.

"Article 1.

"An act regulating the laying, constructing, and maintaining and operating of gas pipe lines for the transportation of natural gas within the state of Oklahoma, defining the modes of procedure for the exercise of the right of eminent domain for such purposes, providing for the inspection and supervision of the laying of such pipe lines and limiting the gas pressure therein, and providing penalties for the violation thereof.

"Be it enacted by the people of the state of Oklahoma:

"Section 1. Any firm, copartnership, association or combination of individuals may become a body corporate under the laws of this state for the purpose of producing, transmitting, or transporting natural gas to points within this state by complying with the general corporation laws of the state of Oklahoma, and with this act.

"Sec. 2. No corporation organized for the purpose of, or engaged in the transportation or transmission of natural gas within this state shall be granted a

charter or right of eminent domain, or right to use the highways of this state unless it shall be expressly stipulated in such charter that it shall only transport or transmit natural gas through its pipe lines to points within this state; that it shall not connect with, transport to, or deliver natural gas to individuals, associations, copartnerships, companies or corporations engaged in transporting or furnishing natural gas to points, places, or persons outside of this state.

"Sec. 3. Foreign corporations formed for the purpose of, or engaged in the business of transporting or transmitting natural gas by means of pipe lines, shall never be licensed or permitted to conduct such business within this state.

"Sec. 4. No association, combination, copartnership or corporation shall have or exercise the right of eminent domain within this state for the purpose of constructing, or maintaining a gas pipe line or lines within this state, or shall be permitted to take private or public property for their use within this state, unless expressly granted such power in accordance with this act.

"Sec. 5. The laying, constructing, building and maintaining a gas pipe line or lines for the transportation or transmission of natural gas along, over, under, across or through the highways, roads, bridges, streets, or alleys in this state or of any county, city, municipal corporation or any other public or private premises within this state is hereby declared an additional burden upon said highway, bridge, road, street, or alley, and any other private, or public premises may only be done when the right is granted by express charter from the state and shall not be constructed, maintained, or operated until all damages to adjacent owners are ascertained and paid as provided by law.

"Sec. 6. All pipe lines for the transportation or transmission of natural gas in this state shall be laid under the direction and inspection of proper persons skilled in such business to be designated by the chief mining inspector for such duty, and the expenses of such inspection and supervision shall be borne and paid for by the parties laying and constructing such pipe lines for the transportation or transmission of natural gas.

"Sec. 7. No pipe line for transportation or transmission of natural gas shall be subjected to a greater pressure than three hundred pounds to the square inch, except for the purpose of testing such lines, and gas pumps shall not be used on any gas pipe lines for the transportation or transmission of natural gas or used on or in any gas well within this state.

"Sec. 8. Any corporation granted the right under the provisions of this act to exercise the right of eminent domain, or use the highways of this state to construct or maintain a gas pipe line or lines for the transportation or transmission of natural gas to points within this state, which shall transport or transmit any natural gas to a point outside of, or beyond this state, or shall connect with or attempt to connect with or threaten to connect with any gas pipe line furnishing, transporting, or transmitting gas to a point outside of, or beyond this state, shall by each or all of said acts, forfeit all right granted it or them by the charter from this state, and the said forfeiture shall extend back to the time of the commission of said act or said acts in violation of this Act; and such act or acts shall of themselves work a forfeiture of any and all rights of any and every kind and character which may be or may have been granted by the state for the transportation or transmission of natural gas within this state, and all

the property of said corporation and all the property at any time belonging to said corporation, at any time used in the construction, maintaining or operation of said gas pipe line or lines shall, in due course of law, be forfeited to and be taken into the possession of the state through its proper officer and in said action there shall be a right to the state of the appointment of a receiver, either before or after the judgment, to be exercised at the option of the state, and the officer taking possession of said property shall immediately disconnect said pipe line or lines at a proper point in this state from any pipe line or lines going out of, or beyond the state. And said property shall be sold as directed by the court having jurisdiction of said proceedings, and the proceeds of said sale shall be applied, first to the payment of the cost of such proceeding, and the remainder, if any, paid into the school fund of the state, and said charter under which said act or acts were committed shall be revoked, and no charter for the transportation or transmission of natural gas shall ever be granted to any corporation having among its stockholders any person who was one of the stockholders of said corporation, whose charter has or may have been forfeited as aforesaid, and if any such charter shall have been granted, and thereafter a person shall become a stockholder thereof who was one of the stockholders of the corporation whose charter has been or may have been forfeited, as herein provided, the charter of said corporation, one of whose stockholders is as last named, shall therefore be forfeited and revoked: Provided, that any person who may be denied the right to become a stockholder as above prescribed may be granted the right to become such stockholder by the corporation commission, when such person shows to such commission that he was not a party to the former violation of this act.

"Sec. 9. No pipe lines for the transportation or transmission of natural gas shall be laid upon private or public property when the purpose of such line is to transport or transmit gas for sale to the public until the same is properly inspected as provided in this act; and before any gas pipe line company shall furnish or sell gas to the public, it shall secure from the inspector a certificate showing that said line is laid and constructed in accordance with this act, and under the inspection of the proper officers, provided, that nothing in this act shall be construed to prevent persons drilling for oil and gas from laying surface lines to transport or transmit gas to wells which are being drilled within this state and further provided, that factories in this state may transport or transmit gas through pipe lines for their own use for factories located wholly within this state, upon securing the right of way from the state over or along the highways and from property owners to their lands.

"Sec. 10. That no person, firm or association or corporation shall ever be permitted to transmit or transport natural gas by pipe lines in this state or in this state construct, operate a pipe line for the transmission of natural gas, except such persons, firms, associations, or corporations be incorporated as in this act provided, except as in section 9 of this act, and provided further that all persons, firms, corporations, associations and institutions now doing the business of transporting or transmission of natural gas in this state and otherwise complying with this act are hereby permitted to incorporate under the provisions of this act within ten days after the passage and approval of the same.

"Sec. 11. All acts and parts of acts in conflict with this act are hereby repealed.

"Sec. 12. An existing emergency is hereby declared by the Legislature for the preservation of the public peace, health and safety of the state.

"Sec. 13. This act shall take effect from and after its passage and approval as provided by law.

"Approved December 21, 1907."

The several bills presented in the above entitled and numbered cases call in question the constitutional validity of the foregoing enactment. The status and interest of the several complainants in the subject-matter of this litigation, as averred in the bills of complaint, may be briefly stated as follows:

The Kansas Natural Gas Company, complainant in case No. 856, is, and was at the date of the commencement of that suit, a corporate citizen of the state of Delaware. Its business is that of purchasing and distributing natural gas to consumers. It is in the market for, and is willing to buy and receive, large quantities of natural gas for transportation by it to the several cities of Kansas and Missouri along its trunk pipe line, and supplied by it with natural gas there to be distributed, sold, and used. It has a contract for the purchase of all the gas that can be produced from a certain well located in Washington county, this state, and has acquired by purchase a right of way over and across the land upon which said well is situated for the laying of a pipe line for the transportation of said gas. It proposes to, and if permitted to so do will, extend its present trunk pipe line from the present southern terminus thereof in the state of Kansas southward across the state line into the state to receive gas which it has a right to receive under its said contract. It also proposes to build and construct lateral and branch lines from said main trunk line so extended for the purpose of gathering and receiving such gas as it may be

able to purchase from the owners of other wells in the state. Said line will be used by it for the transportation of natural gas from wells in the state into the states of Kansas and Missouri, and not in any way for local traffic in the state. The cost of constructing its proposed pipe lines will be more than $100,000.

The Marnet Mining Company, complainant in case No. 857, is, and was at the date of the commencement of that suit, a corporate citizen of the state of West Virginia. For the purpose of transporting natural gas from the owners and producers thereof in the state to purchasers and consumers thereof in the states of Kansas and Missouri, it has purchased a right of way over certain lands in this state, and proposes to build and construct a system of pipe lines from the states of Kansas and Missouri into this state, to be used exclusively for interstate transportation of natural gas, and not in any way for local traffic in the state. Upon the completion of said pipe line, it will be in the market for, and will be willing to buy and receive, large quantities of natural gas, to be delivered at the wells in this state, and thence transported by it through said pipe lines out of the state, and into the states of Kansas and Missouri, for sale, distribution, and use in those states.

A. W. Lewis, complainant in case No. 858, is, and was at the date of the commencement of said suit, a citizen and resident of the state of Ohio. He is the owner of an oil and gas lease made to him by one Stephen B. Tehee on the 12th day of May, 1905, by the terms of which he has acquired the right to construct wells on a certain tract of land in this state belonging to said Tehee, and to take therefrom all the gas which can be produced from said premises for a period of 15 years from the date of said contract. Agreeable to the terms of said contract, complainant at a cost of many

thousand dollars drilled and constructed a well upon said land capable of producing many millions of cubic feet of gas per day. Because of the supply of gas in this state being in excess of the local demand, he is unable to sell, market, or dispose of the same in this state, and, being prevented from transporting said gas from the state, he has suffered great loss and damage in being deprived of his property without compensation.

O. A. Bleakley, complainant in case No. 859, is a citizen and resident of the state of Pennsylvania, and was at the date of the commencement of that suit. For the purpose of constructing a pipe line for transportation of natural gas from certain points in this state into the state of Kansas, he applied to the honorable Secretary of the Interior for a right of way over the lands of certain Indians in Washington county, in this state, through which said proposed pipe line will run, and on the 2d day of June, 1908, the honorable Secretary of the Interior of the United States, by virtue of the power vested in him, did grant unto complainant the right of way across said Indian lands along and over a certain designated route. This right of way was granted to complainant on condition that he should, in accordance with the laws of the United States and the rules and regulations of the Interior Department, pay to the Indian agent the value of such right of way, the damages which the several owners of land over which the same would pass would sustain from laying, building, and maintaining said line. In compliance with said condition and requirement he paid to the Indian agent at Muscogee the sum required to be paid, said sum being the full and fair amount of such right of way and the full and fair amount of such damages. The complainant proposes to build and construct a pipe line on the right of way so obtained, for the exclusive purpose of transporting natural gas from this state into the state of Kansas, not in any way for local traffic in this state.

The several bills further disclose under a large area of this state natural gas exists in abundance; that a large number of wells have been drilled at great expense and capable of producing more than 1,000,000,000 cubic feet of natural gas per day; that this amount is much more than is required to meet all the demands of the people of the state, that this excess of supply is required to meet the wants of those residing without the state, in the states of Kansas and Missouri; and while such want may be supplied through distributing plans now constructed and those contemplated by complainants, and the excess product may be there disposed of at a fair profit by the owners, under present conditions the owners are required to cease development work, to keep large and valuable wells capped and inoperative, to their great injury and damage. It is further disclosed by the several bills the gas owned by complainants for the most part is produced from lands owned by Indians under leases executed by them with the approval of the Secretary of the Interior before the admission of this state into the Union. It is further averred in the bills the sole object and purpose of complainants is to engage in the marketing and transportation of natural gas beyond the confines of the state only, and not to engage in the performance of any public service in this state; that in constructing lines for such transportation it will not be necessary to carry them along and upon the public highways of the state, but only to cross under or over the same; that such pipe lines so to be constructed are private lines, to be safely and properly constructed and laid by virtue of private contracts with the owners of the land in such manner as to endanger the lives, health, and property of no one, and in just conformity to any and all reasonable rules and regulations of the state for the safety and health of the citizens of said state. The several bills further aver each of the defendants, by virtue of his office and the Constitution and laws of the state of

Oklahoma, is clothed with some power and authority and charged with the performance of some duty in the execution and enforcement of the laws of the state and in the protection of public rights, and particularly in respect to the execution and enforcement of the provisions of chapter 67 of the Session Laws of the State for the Year 1907, above set forth, and that as such officer, or otherwise, they have assumed and undertaken to execute and enforce said act by both actions and proceedings in the courts of the state and by force of arms; that it is the avowed object, purpose, and intent of the defendant to the several bills, and each and every of them, to prevent the transportation of natural gas produced in this state beyond the limits of the state, and to that end they are charged with the commission of the following acts:

(1) They caused to be passed by the Legislature of the state the act above set forth. It is further charged said act was passed solely for the purpose of preventing the transportation of natural gas beyond the borders of the state; that said act is wholly illegal and void, because in contravention of certain designated articles of the Constitution of the United States and of this state. (2) That with force and violence, against the rights of the owners thereof, and in violation of the Constitution of the United States and of this state, defendants seized a gas pipe line in course of construction across the line dividing the state of Kansas and this state, and which was to be used wholly and solely for interstate carriage and transportation of gas, tore the same up, and threw the gas pipe and materials of which it was being constructed back upon the Kansas side of the state line. (3) Defendants caused the line dividing the state of Kansas and this state to be patrolled on the Oklahoma side thereof with armed guards, ordered and instructed by defendants to resist by force and arms the laying and build-

ing of any gas pipe line across said line, and to prevent with force and violence the building of any such line, and, if necessary to that end, to tear up and destroy the same. (4) That defendants have, assuming to act in pursuance of the authority granted by the foregoing act, taken possession of all pipe lines engaged in the interstate transportation of natural gas from this state into adjoining states, by force and violence or through receiverships in legal proceedings in the local courts of the state, the sole object and purpose of which was to effectually prohibit and prevent the transportation of natural gas from out this state; that defendants threaten, and it is their purpose, to tear up and destroy by force and violence any gas pipe line transporting natural gas from out this state, and to prevent by force, violence, and by trespass upon the complainants' property and rights, the construction and operation of any pipe line constructed by complainants.

The prayers of the several bills of complaint are as follows: (1) For discovery; (2) that chapter 67, Laws 1907, set forth in the bills, may be declared illegal and void, because in conflict with section 8, art. 1, and the fourteenth amendment to our national Constitution; also illegal and void as offending against the provisions of section 57, art. 5, and sections 24 and 32, art. 2, of the Constitution of the state; (3) that defendants, each and all of them, their agents, servants, and employes, may be perpetually enjoined and restrained from tearing up, destroying, or in any way interfering with the laying, building, or construction of natural gas pipe lines by complainants for the purpose disclosed in the bills of complaint, and from bringing or maintaining in the courts of the state any suits or actions under the provisions of the statute above set forth, or any other law, to restrain complainants from constructing, maintaining, and operating any such pipe line, or to restrain com-

plainants from transporting natural gas from out the state; (4) a temporary or provisional injunction of like effect and purpose *pendente lite;* (5) other and general equitable relief.

Against these several bills, defendants, each and all, have lodged demurrers, which were presented in oral argument and now stand submitted for decision on elaborate briefs filed by the solicitors for the respective parties, together with application on the part of complainants for provisional injunctions *pendente lite.* In support of the demurrers interposed, defendants contended, as follows: (1) That these suits, while in name against defendants, occupying official positions under the Constitution and laws of the state, are in truth and in fact against the state of Oklahoma in its sovereign capacity; hence are in contravention of the eleventh amendment to the Constitution. (2) That the act above set forth is a lawful exercise of the legislative power of the state in controlling, safeguarding and protecting the use and enjoyment of the public highways of the state, the organization of corporate citizens of the state, and the conferring thereon corporate powers, in regulating the laying of natural gas pipe lines, providing for the inspection of such lines, and other matters, all within the legislative power of the state. (3) That the act is valid, because passed by the Legislature in a lawful exercise of the police power of the state, in preserving and protecting from waste the natural resources of the state. (4) It is contended, if the law be unconstitutional, complainants have not by their bills shown such interest in the subject-matter of the litigation as will enable them in challenge the validity of the enactment:

In support of the bills it is the insistence of complainants: (1) Regardless of the form of the act and its de-

clared purpose, as expressed in the title, the manifest, dominant object and purpose sought to be accomplished thereby is to prevent the transportation of natural gas from out the state into other states. That the courts will look beyond the mere declaration of purpose stated in the title of the act to find its true intent and purpose, and, such true intent and purpose being found to be to prohibit or regulate commerce among the states, the act will be declared void because in violation of the commerce clause of the Constitution. (2) That a state has no such public interest in natural gas found within its territorial limits as will authorize it to prevent its transportation in interstate commerce, but that the owner of the soil, or the lessee of natural gas rights in the land from the owner, has a vested private property right in the gas found therein, which, when reduced to possession, is a purely private right of ownership; with full power of sale, disposition, and transportation under proper safeguards, which private property rights of the individual cannot be taken away, destroyed, or unduly restricted by the state without just compensation be made to the owner. And as the act in question attempts to take away, destroy, or render less valuable such private property rights of complainants, without compensation, it is in violation of the fourteenth amendment to the national Constitution and section 24, Art. 2 of the Constitution of the state. (3) That the fee of the public highways of the state is by law vested in the abutting landowners, and not in the state, as contended by defendants. That the public have a right of easement in the highways only. Therefore complainants, while conceding they may not forcibly obtain a right of way for their pipe lines, save by the exercise of the sovereign power of eminent domain, which the state may lawfully refuse to grant them, yet they assert they have the lawful right to procure such right of way by private contract and purchase from the owners, and for such purpose no franchise from the state and

no right to exercise the power of eminent domain granted by the state is necessary. (4) The said act is in contravention of the Constitution of the state, because it contains more than one subject, not clearly expressed in its title. (5) Because it attempts to create monopolies, grant exclusive privileges and franchises to corporations of its creation, and in violation of the constitutional provisions of the state.

The questions raised for decision by these several conflicting contentions are important to complainants and all others similarly situated with them, the state, as represented by its defendant officials, and the public at large, in that the validity of an act of the Legislature of the state declaring the will of the state on a question of great public importance is challenged, and its validity must be determined. However, as said by Chief Justice Marshall delivering the opinion of the court in the great case of *Cohens vs. Virginia*, 6 Wheat. 264, 5 L. Ed. 257:

> "It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the Legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur, which we would gladly avoid; but we cannot avoid them. All we can do is to exercise our best judgment and conscientiously to perform our duty."

Therefore, with due regard for the importance of the questions presented and the responsibility attendant upon their decision, we shall proceed to a determination of the cases. And, first, let us inquire whether it be true, as contended by defendants, these suits in legal effect have been brought and are sought to be maintained against the sovereign state of Oklahoma in violation of the eleventh amendment to the Constitution of the United States; for in the orderly administration of justice no court should proceed to decision unless satisfied of its right to so do. We shall therefore first advert to the question of jurisdiction of this court to proceed at the suit of complainants against defendants who occupy official positions in the state and stand charged with the public trust imposed on them by its laws; for, if it be true defendant officials are sought to be restrained or prevented by complainants from carrying out the will of the state, as lawfully expressed through the legislative branch of its government, in the exercise of its sovereign power to legislate, then these suits are in a true and just sense directed against the sovereign state of Oklahoma, because they are brought and sought to be maintained against those who are admitted to be the lawfully constituted representatives of the state, charged by its laws with the performance of certain public duties.

However, the inquiry here necessary to be made does not end with the determination that defendants are lawfully constituted representatives of the state. That much is conceded. The question rather is: Has the Legislature of the state by the act in question sought to impose on defendants, its lawfully constituted representatives for some purposes, the discharge of other duties, over and beyond its constitutional powers to impose, the performance of which by defendants will result in injury to complainants? For, if so, as the Legislature of the state acted outside its con-

stitutional bounds, the act must fall, and in falling carry down the obligations and duties sought to be imposed upon defendants, and they will be left standing naked, as individuals clothed with no power or authority emanating from the state, and thus viewed and considered alone as individuals assuming to act under the guise of law where no law exists; for an unconstitutional act is not law, confers no power, and creates no office.

Mr. Justice Field, in *Norton vs. Shelby County*, 118 U. S., 425, 6 Sup. Ct., 1121, 30 L. Ed., 178, said:

> "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

Mr. Justice Peckham, delivering the opinion of the court in *Ex parte Young*, 209 U. S., 123, 28 Sup. Ct., 441, 52 L. Ed., 714, 13 L. R. A. (N. S.), 932, after an extended review of many prior decisions of that court, says:

> "The various authorities we have referred to furnish ample justification for the assertion that individuals, who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the federal Constitution, may be enjoined by a federal court of equity from such action."

In *Illinois Central Railroad Co. vs. Adams*, 180 U. S., 28, 21 Sup. Ct., 251, 45 L. Ed., 410, Mr. Justice Brown, delivering the opinion, says:

> "The question whether this is a suit against the state, within the eleventh amendment to the Constitu-

tion, which provides that the judicial power of the United States shall not be construed to extend to suits against one of the United States by citizens of another state, is also one which we think belongs to the merits, rather than to the jurisdiction. If it were a suit directly against the state by name, it would be so palpably in violation of that amendment that the court would probably be justified in dismissing it upon motion; but the suit is not against the state, but against Adams individually, and if the requisite diversity of citizenship exist, or if the case arise under the Constitution or laws of the United States, the question whether he is so identified with the state that he is exempt from prosecution, on account of the matters set up in the particular bill, are more properly the subject of demurrer or plea than of a motion to dismiss. This seems to have been the opinion of Chief Justice Marshall in *Osborn vs. Bank of the United States*, 9 Wheat., 738, 858, 6 L. Ed., 204, wherein he makes the following observation: 'The state not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties.'"

See also, *Scully vs. Bird*, 209 U. S., 481, 28 Sup. Ct., 597, 52 L. Ed., 899.

Hence it appears too clear for argument we must first consider and determine the validity of the act challenged by complainants before we are qualified to pass upon the objection urged that the suits are in effect against the state, and as such in contravention of the eleventh amendment to the Con-

stitution. We shall, therefore, proceed to the constitutional validity of the act quoted. And, first let us consider whether the charge made against the act by complainants, that the true legislative intent and purpose is not expressed in its title, but, on the contrary, the sole, dominant object and purpose of the Legislature in the passage of the act was to prevent the transportation through pipe lines of natural gas from out of the state, and whether such purpose clearly appears from an examination of the provisions of the act itself; for, if so, it is quite clear this court may and should consider the act in its true light, regardless of the purpose expressed in its title.

There can be no doubt, we think, but that the purpose of the act as expressed in its title is clearly within the constitutional power of the Legislature of the state and impervious to any objection emanating from that source. By a reference to the act itself, it will be seen section 1 provides for the formation of domestic corporations to engage in the business of transporting natural gas within the state, a power clearly within constitutional limits, standing by itself. However section 2 provides no such corporation shall be granted a charter to transport natural gas through pipe lines unless as a condition precedent to such grant it shall stipulate as follows: First, that it will transport natural gas only in the state; second, that it will not connect with, transport or deliver natural gas to individuals, associations, companies or corporations engaged in carrying or furnishing natural gas to points, places or persons without the state; and, further, that such stipulation or contract with the state shall be embodied in its charter, and unless such company so contracts it cannot exercise the power of eminent domain, and cannot acquire any right to cross over, under or along the highways of the state. Section 3 declares that foreign corporations engaged in transporting natural

gas by means of pipe lines shall never be licensed by or permitted to conduct such business within the state. By section 4 it is provided that no association, combination, partnership or corporation shall be granted the right to exercise the power of eminent domain for the purpose of acquiring a right of way for its pipe lines in the state, unless incorporated under this act. By section 5 it is provided the construction of maintaining of a natural gas pipe line along, under, over or across any public highway of the state, or any streets, alleys or public ground of any city in the state, is an additional burden on the servitude or easement theretofore granted. Section 6 provides for the laying of natural gas pipe lines under the supervision of the mine inspector of the state. Section 7 makes provision for the tensile strength of the materials, employed in constructing any natural gas pipe line, and further provides against the pumping of gas from wells into such mains. Section 8 expressly provides against any corporation so organized transporting any natural gas out of the state, also provides against any such corporation connecting, attempting to connect, or threatening to connect with any pipe line transporting natural gas outside or beyond the limits of the state, and makes the act of any such corporation in so doing a ground of forfeiture of all its corporate rights theretofore granted, following by the confiscation of all its property to the state, and other drastic and unusual punishment not only visited on the offending corporation itself, but on its stockholders and others. Section 9 makes provision for the inspection of natural gas pipe lines employed by public service corporations in the state, and provides that factories located wholly within the state may maintain private pipe lines to obtain their supply. Section 10 provides a complete and absolute prohibition against all persons, firms, associations and corporations constructing or operating a pipe line in the state for the purpose of transporting natural gas, except they shall become a body corporate under the terms of this act.

From this reference to the body of the act, it is seen, in some respects, the Legislature proceeded in pursuance of its undoubted legislative power, and in such matters the act is plainly valid, even if its remaining features be found void, if such valid matters be found capable of separation from the invalid parts. But can any reasonable man of limited intelligence, from an examination of the act, believe the true intent and purpose of the Legislature was to make provision for such minor details as inspection of pipe lines laid for the transmission of natural gas, or the incorporation of pipe line companies to transport natural gas, or the conferring on such companies of the power of eminent domain, or the right to use the public highways of the state, or the streets and alleys of its cities, or other like purposes expressed in the title of the act? On the contrary, can any reasonably intelligent mind read this act and remain blind to and unaware of the real purpose sought to be accomplished thereby? Does not every section and line, save in respect to matters of minor importance mentioned, proclaim in the loudest tones, and in the most positive and convincing manner, a subtle and determined purpose to forever foreclose all persons from the attempt to convey in any manner, through the instrumentality of pipe lines, natural gas out of the state, and to thus cut off and destroy any interstate transportation of such product as effectually as though such business had been in express terms interdicted? We have encountered no doubt whatever in arriving at the conclusion the charge made against the act by complainants, that its true intent and purpose is not stated in its title, but that the dominant object and purpose of the act was to place within the grasp of the state the absolute dominion and control of the business of transportation of natural gas through pipe lines (the only practicable method of conveyance of such product known), to the end that by the exercise of such control it might absolutely and forever prohibit its transportation beyond the territorial boundaries of the state, is true.

That this court may, should and will look beyond the purpose of the act as declared in its title, to ascertain from an examination of its body the true object sought to be accomplished thereby, is open to neither dispute nor doubt. Mr. Justice Harlan, delivering the opinion of the court in *Mugler vs. Kansas*, 123 U. S., 623, 8 Sup. Ct., 273, 31 L. Ed., 205, said:

> "It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police power of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute (*Sinking Fund Case*, 99 U. S., 700, 718, 25 L. Ed., 496), the courts must obey the Constitution rather than the lawmaking department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. 'To what purpose,' it was said in *Marbury vs. Madison*, 1 Cranch., 137, 176, 2 L. Ed., 60, 'are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.' The courts are not bound by mere forms, nor are they to be misled by mere pretense. They are at liberty—indeed, are under a solemn duty—to look at the substance of things. * * * whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute, purporting to have been enacted to protect the public health, the public morals or the public safety,

has no real or substantial relation to those objects, or is a palpable invasion of rights secured * * * by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

Mr. Justice Matthews, in the case of *Yick Wo vs. Hopkins*, 118 U. S., 356, 6 Sup. Ct., 1064, 30 L. Ed., 220, in passing on a city ordinance of the city of San Francisco, fair on its face, said:

"In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinance complained of, as tried merely by the opportunities which their terms afford of unequal and unjust discrimination in their administration; for the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the fourteenth amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. The principle of interpretation has been sanctioned by this court in *Henderson vs. Mayor of New York*, 92 U. S.,

259, 23 L. Ed., 543; *Chy Lung vs. Freeman*, 92 U. S., 275, 23 L. Ed., 550; *Ex parte Virginia*, 100 U. S., 339, 25 L. Ed., 676; *Neal vs. Delaware*, 103 U. S., 370; 26 L. Ed., 567; and *Soon Hing vs. Crowley*, 113 U. S., 703, 5 Sup. Ct., 730, 28 L. Ed., 1145."

Viewed in the light of authority, tested by the very reason and common sense of the situation disclosed by the record in these cases, can the state, through its defendant officers, accomplish the object and purpose sought to be attained by it in the passage of the foregoing act? That is, can it prohibit the exportation of natural gas beyond its boarders, and thus conserve it for the use, benefit and enjoyment of its own people, and the upbuilding and fostering of manufacturing establishments and other commercial industries and enterprises, the result of which will serve to increase the taxable wealth of the citizens of its state, and make it commercially great and prosperous among the sisterhood of states? In other words, the question of supreme importance here presented for decision, in its last analysis, is this: Does a state possess the constitutional power, derivable from any source whatever under our Constitution and laws, to prohibit, through its legislative assembly and lawfully constituted officials assuming to act in pursuance of its expressed will, the transportation of natural gas in interstate commerce, or persons from engaging in such enterprise in a lawful manner? For, unmasked and shorn of all pretexts, evasions and subterfuges, this is beyond all cavil precisely what the act in controversy contemplates, and its enforcement, if valid, means; for it is both incomprehensible and inconceivable to our minds that it might even be thought by any one that another view of the act in question should be taken by a court, or that it might in the end be solemnly decreed that which is abortive and ineffectual if attempted by direction shall become virile and impregnable

to attack if sheltered behind such subterfuges, glossed by such pretexts, or coated with such evasions as are here employed, which are, as was so well said by Judge Philips in *United States vs. Colorado & N. W. R. R. Co.*, 157 Fed., 342, 85 C. C. A. 48, "but the rose in the mailed hand."

In the determination of the question thus presented it is well to ever bear in mind this nation is no longer and in no just sense simply a confederacy of sovereign states, acting by virtue of a joint agreement, with all the jealousies, discords, weaknesses and perils attendant thereon, but it is a single, effective, united, centralized, organized, powerful, fearless nation, whose Constitution and laws, enacted in pursuance thereof, are the supreme law of this land, binding, controlling and governing the conduct of the most powerful state and the most humble citizen alike; that its constitutional power extends to every foot of space and every subject-matter within its territorial limits, and is there ever present and acting. State lines do not affect its operation, and state laws cannot trench upon the exercise of its authority. Such a national government, invested with such national powers, the thirteen original states formed for their mutual welfare, protection and advantage, after a vain and futile attempt to live and subsist under a government formed by a confederacy of states. To the continued existence and perpetuity of such a national government, truly national and supreme, not alone in name, but in the dignity and majesty of power, each succeeding state admitted into the Union, as a condition precedent to its admission, irrevocably consented, and will remain bound by such consent until time shall be no more. Wherever goes this national power, there goes the power of the Courts for its enforcement. As said by Chief Justice Marshall in *Cohens vs. Virginia, supra*:

> "That the United States formed, for many and for most important purposes, a single nation, has not yet

been denied. In war, we are one people. In making peace, we are one people. In all commercial regulations we are one and the same people."

True it is, hand in hand with the supreme national power, within its territorial borders, goes the sovereign power of the state, operating upon all matters of purely local or intrastate concern, which have not been committed to the control of the nation. The two powers, each in its proper sphere supreme, invade all our national space, wherever states have been created and their boundaries marked out, existing in absolute harmony one with the other, never, when properly interpreted, understood and applied, coming in conflict with each other, but moving onward and upward in perfect harmony toward a broader and better civilization and a higher national destiny for all, with that accuracy and precision that governs the movement of the planets in their orbits or the seasons in their course. Considered in this light, let us proceed to a determination of the questions presented, stopping to inquire, on the one hand, whether the constitutional objections interposed by complainants to the validity of the act in question, viewed in its true light, are sound and tenable, as the limits of those objections have been pointed out and applied by courts of the highest standing from the beginning, and, on the other hand, whether the power attempted to be exercised in this instance by the state is within its proper sphere of influence, or comes in conflict with the exercise of powers expressly delegated to the nation or withheld from the state.

Complainants first contend the act in question, viewed as one intended to prohibit the transportation of natural gas without the territorial limits of the state by means of pipe lines, is void, because repugnant to clause 3 of section 8, art. 1, of the federal Constitution, which confers on Congress the

exclusive right "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Mr. Hare, in his work, on *American Constitutional Law* (page 1257), in speaking of the power thus conferred on Congress, says:

> "So vast is the subject of this power, and so much does it comprise, that its limits cannot well be defined without the risk of excluding something which may in some form, or at some time, deserve to be included. It is given in the largest and most liberal terms, and has been interpreted and applied with adequate, if not equal, liberality."

Chief Justice Marshall, delivering the opinion of the court in the great case of *Gibbons vs. Ogden*, 9 Wheat, 1, 6 L. Ed., 23, said:

> "Commence among the states cannot stop at the external boundary line of each state, but may be introduced into the interior. It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient, and is certainly unnecessary. Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more states than one."

Again:

> "Commerce, in its simplest signification, means an exchange of goods; but, in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange become commodities, and enter into commerce. The subject, the vehicle, the agent, and their various operations, become the objects of commercial regulation."

Again:

"Interstate commerce, or commerce among the several states, is commerce that concerns more than one state. The only form of commerce within the limits of the United States which is not subject to the vast and exclusive power of Congress is the purely internal commerce of each state, which is reserved to each by direct implication."

Mr. Justice Field, in *Welton vs. State of Missouri*, 91 U. S., 275, 23 L. Ed., 347, said:

"Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different states. The power to regulate it embraces all the instruments by which such commerce may be conducted."

Mr. Justice Peckham, in *Hopkins vs. United States*, 171 U. S., 578, 19 Sup. Ct., 40, 43 L. Ed., 290, said:

"Definitions as to what constitutes interstate commerce are not easily given, so that they shall clearly define the full meaning of the term. We know from the cases decided in this court that it is a term of very large significance. It comprehends, as it is said, intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale, and exchange of commodities between the citizens of different states, and the power to regulate it embraces all the instruments by which such commerce may be conducted. *Welton vs. Missouri*, 91 U. S., 275, 23 L. Ed., 347; *Mobile County vs. Kimball*, 102 U. S., 691, 26 L. Ed., 238; *Gloucester Ferry Co. vs. Pennsylvania*, 114

U. S., 196, 5 Sup. Ct., 826, 29 L. Ed., 158; *Hooper vs. California,* 155 U. S., 648, 653, 15 Sup. Ct., 207, 39 L. Ed., 297; *United States vs. E. C. Knight Company,* 156, U. S., 1, 15 Sup. Ct., 249, 39 L. Ed., 325."

Mr. Justice Brewer, delivering the opinion in *Re Debs,* 158 U. S., 564, 15 Sup. Ct., 900, 39 L. Ed., 1092, said:

"Up to a recent date commerce, both interstate and international, was mainly by water, and it is not strange that both the legislation of Congress and the cases in the courts have been principally concerned therewith. The fact that in recent years interstate commerce has come mainly to be carried on by railroads and over artificial highways has in no manner narrowed the scope of the constitutional provision or abridge the power of Congress over such commerce. On the contrary, the same fullness of control exists in the one case as in the other, and the same power to remove obstructions from the one as from the other. Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same to-day as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad train and the steamship. Just so it is with the grant to the national government of power over interstate commerce. But it operates to-day upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop."

The reason for conferring this unbounded and exclusive reach of power on Congress, if reason need be given, is not only familiar to all students of the history of our country, but this reason has been stated and emphasized by oft-repeated decisions of the Supreme Court until it is no longer misunderstood by any one. In *Welton vs. State of Missouri, supra*, it is said:

> "The very object of investing this power in the general government was to insure this uniformity against discriminating state legislation. The depressed condition of commerce and the obstacles to its growth previous to the adoption of the Constitution, from the want of some single controlling authority, has been frequently referred to by this court in commenting upon the power in question, 'It was regulated,' said Chief Justice Marshall, in delivering the opinion in *Brown vs. Maryland*, 12 Wheat., 419, 6 L. Ed., 678, 'by foreign nations, with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the federal government to enforce them became so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the federal government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress."

Mr. Chief Justice Waite, delivering the opinion of the court in *Pensacola Tel. Co. vs. Western, etc., Tel. Co.*, 96 U. S., 1, 24 L. Ed., 708, said:

> "The powers thus granted are not confined to the instrumentalities of commerce or of the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stagecoach, from the sailing vessel to the steamboat, from the coach and steamboat to the railroads, and from the railroads to the telegraph, as these agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that intercourse among the states and the transmission of intelligence are not obstructed or unnecessarily incumbered by state legislation."

Therefore there can be no doubt whatever but that the transportation of natural gas in interstate commerce through pipe lines is interstate commerce within the meaning of the commerce clause of the federal Constitution, unless the very nature of the article itself, natural gas, is such as to take it out of the domain of commerce, as that term is employed in the Constitution, and consequently to place it within the power of the Legislature of Oklahoma to control, regulate, or prohibit, as is attempted by the act in question.

On this head it is the contention of defendants that natural gas must be considered as animals *ferae naturae*,

running streams, the air we breathe, and our forest reserves, which are the common heritage of the whole people, which the state, as the representative of all the people, by virtue of this common ownership, may regulate and control for the benefit of all, and over which no man may acquire such absolute ownership as the state may not regulate or control; and the cases of *Geer vs. Connecticut*, 161 U. S., 519, 16 Sup. Ct., 600, 40 L. Ed., 793, relating to the transportation of wild game; *Georgia vs. Tennessee Copper Co.*, 206 U. S., 230, 27 Sup. Ct., 618, 51 L. Ed., 1038, relating to the contamination of the air of Georgia by fumes from the smelters of the defendant company, and *Hudson Water Co. vs. McCarter*, 209 U. S., 349, 28 Sup. Ct., 529, 52 L. Ed., 828, relating to the carriage of the waters of the Passaic river of New Jersey into New York, are cited in support of the contention made.

In this connection we deem it neither wise nor necessary to attempt a determination of what precise rule of property rights shall govern and control the disposition of the vast deposits of petroleum, gas, and oil found in this state; for on this question the decisions of the highest judicial tribunals of those states in which these minerals abound are not in harmony. Whether the rule first announced in the case of *Hail vs. Reed*, 15 B. Mon. (Ky). 479, and followed by the courts of last resort in all the great oil and gas producing states save one, Indiana, shall become the law of this class of property in this state, is deemed immaterial to a decision here; for, which ever rule may be adopted, the conclusion here reached must be the same, as will be seen from a statement of the rules. The rule of property right in natural gas and oil in all the states save Indiana is stated by Mr. Justice Shiras in *Brown vs. Spilman*, 155 U. S., 665, 15 Sup. Ct., 245, 39 L. Ed., 304, as follows:

> "Petroleum gas and oil belong to the owners of the land, and are a part of it, so long as they are on it

or in it, or subject to his control; but when they escape and go into other land, or come under another' s control, the title of the former owner is gone. If an adjoining owner drills his own land and taps a deposit of oil or gas extending under his neighbor's field, so that it comes into his well, it becomes his property."

See, also, *Snyder on Mines*, pp. 954-958, Sec. 1170; *Thornton on Oil and Gas*, pp. 18-20; *White on Mines and Mining Remedies*, p. 223, Sec. 162; *Funk vs. Haldeman*, 53 Pa., 248; *Stoughton's Appeal*, 88 Pa., 198; *Blakeley vs. Marshall*, 174 Pa., 429, 34 Atl., 564; *Gill vs. Weston*, 110 Pa., 317, 1 Atl., 921; *Gas Co. vs. DeWitt*, 130 Pa., 249, 18 Atl. 724, 5 L. R. A., 731; *Chartiers Block Coal Co. vs. Mellom*, 152 Pa., 297, 25 Atl., 597, 18 L. R. A., 702, 34 Am. St. Rep., 645; *Hague vs. Wheeler*, 157 Pa., 341, 27 Atl., 714, 22 L. R. A., 141, 37 Am. St. Rep., 736; *Murray vs. Alfred*, 100 Tenn., 100, 43 S. W., 355, 39 L. R. A., 249, 66 Am. St. Rep., 740; *Moore vs. Griffin*, 72 Kan., 164, 83 Pac. 395, 4 L. R. A. (N. S.), 477; *Isom vs. Rex Crude Oil Co.*, 147 Cal., 659, 82 Pac., 317; *Ontario Natural Gas Co. vs. Gossfield*, 18 Ont. App., 666; *Hughes vs. Pipe Lines*, 119 N. Y., 423, 23 N. E., 1042; *Williamson vs. Jones*, 30 W. Va., 256, 19 S. E., 436, 25 L. R. A., 222; *South Penn Oil Co. vs. McIntire*, 44 W. Va., 305, 28 S. E., 922; *Carter vs. Tyler County Court*, 45 W. Va., 806, 32 S. E., 216, 43 L. R. A., 725; *Williamson vs. Jones*, 43 W. Va., 562, 27 S. E., 411, 38 L. R. A., 694, 64 Am. St. Rep., 891; *Wilson vs. Youst*, 43 W. Va., 834, 28 S. E., 781, 39 L. R. A., 292; *Preston vs. White*, 57 W. Va., 278, 50 S. E., 236; *Kelley vs. Ohio Oil Co.*, 57 Ohio St., 328, 49 N. E., 399, 39 L. R. A., 765, 63 Am. St. Rep., 721; *Gas Co. vs. Ullery*, 68 Ohio St., 271, 67 N. E., 494; *Homemaker vs. Amos*, 73 Ohio St., 170, 76 N. E., 949, 4 L. R. A. (N. S.), 980, 112 Am. St. Rep., 708; *Hail vs. Reed*, 15 B. Mon. (Ky.), 479; *Brown vs. Spilman*, 155 U. S., 665, 15 Sup. Ct., 245, 39 L. Ed., 304.

The rule adopted by the courts of Indiana is this: The owner of the fee of oil or gas bearing lands does not have an absolute ownership in the oil or gas in place in the land, but a qualified ownership only, capable, however, of being made absolute by reduction to possession. *Jamieson vs. Oil Co.*, 128 Ind., 555, 28 N. E., 76, 12 L. R. A., 652; *State vs. Ohio Oil Co.*, 150 Ind., 21, 49 N. E., 809, 47 L. R. A., 627.

However, as has been stated, which of the two is the better rule of decision, and the one which should be adopted as controlling property rights in this class of property in this state, we deem it neither necessary nor proper to here determine; for it is clear, even if the Indiana rule should be adopted, the contention made by defendants that there exists in the people of the state, in the natural gas found within the state, such a common ownership as the state may control and protect for the benefit of the whole people, as it may the wild game of the state, the common air, the flowing streams, etc., must be denied, for this precise point was ruled in clear and forceful language by the Supreme Court, Mr. Justice White delivering the opinion, in *Ohio Oil Company vs. Indiana*, 177 U. S., 190, 20 Sup. Ct., 576, 44 L. Ed., 729, where, giving effect to the property rule established by the courts of Indiana, it is said:

> "But, whilst there is an analogy between animals *ferae naturae* and the moving deposits of oil and natural gas, there is not identity between them. Thus the owner of land has the exclusive right on his property to reduce the game there found to possession, just as the owner of the soil has the exclusive right to reduce to possession the deposits of natural gas and oil found beneath the surface of his land. The owner of the soil cannot follow game when it passes from his property; so, also, the owner may not follow the natural gas when it shifts from beneath his own to the property of some

one else within the gas field. It being true as to both animals *ferae naturae* and gas and oil, therefore, that whilst the right to appropriate and become the owner exists, proprietorship does not take being until the particular subjects of the right become property by being reduced to actual possession. The identity, however, is for many reasons wanting. In things *ferae naturae* all are endowed with the power of seeking to reduce a portion of the public property to the domain of private ownership by reducing them to possession. In the case of natural gas and oil, no such right exists in the public. It is vested only in the owners in fee of the surface of the earth within the area of the gas field. This difference points at once to the distinction between the power which the lawmaker may exercise as to the two. In the one, as the public are owners, every one may be absolutely prevented from seeking to reduce to possession. No divesting of private property, under such a condition, can be conceived, because the public are the owners, and the enacting by the state of a law as to the public ownership, is but the discharge of the governmental trust resting in the state as to property of that character. *Geer vs. Connecticut, supra.* On the other hand, as to gas and oil, the surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property."

And the same distinction between thing *ferae naturae* and natural gas was recognized in *Attorney General vs. Hudson County Water Co.*, 70 N. J. Eq., 695, 65 Atl., 489, where it is said:

"We may concede, also, for present purposes, that subterranean waters, such as may be reached only by

driving wells, when thus acquired, become absolutely the property of the proprietor of the soil, and may be dealt with by him as merchandise, and that, if they be thus converted into a merchantable commodity, the state would not be permitted to prohibit its transportation beyond the confines of the state. Water thus taken from wells may be placed on the same plane with oil and natural gas, concerning the latter of which it was held by the Supreme Court in Indiana in *State ex rel. Corwin vs. Indiana & Ohio Oil, etc., Co.*, 120 Ind., 575, 22 N. E., 778, 6 L. R. A., 579, that the state could not constitutionally prohibit its transportation beyond the confines of the state."

From all of which it becomes apparent the contention of defendants that the natural gas found within the territorial limits of the state is the common heritage of the people of the state which may be conserved and preserved by the state as trustee of those things in which the people have a common interest, as flowing streams, wild animal life, etc., is unsound and must be denied. On the contrary, it must be held he who by lawful right reduces to his possession mineral, gas, or oil has the same absolute right of property therein, with the same power of barter, sale, or other disposition, including, of necessity, the right of transportation and delivery under such reasonable rules and safeguards as the exigencies of the case may demand and the state employ, as the farmer has of his corn, his wheat, or his stock, or the merchant of his wares, and such absolute right therein as the state cannot deny him without making just compensation, and any attempt to so do would be in violation of the fourteenth amendment to the federal Constitution, which provides:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of

the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws."

And it would be also violative of the correlative guaranty found in section 24, art. 2, of the Constitution of the state, in that it would constitute a taking of private property without just compensation made to the owner. While it is undoubtedly true, as has been many times decided by the Supreme Court, a state may entirely exclude a foreign corporation from doing business within the state, or may admit it on such terms and conditions as it may deem proper to impose (*Waters-Pierce Oil Co. vs. Texas*, 177 U. S., 28, 20 Sup. Ct., 518, 44 L. Ed., 657); and, again, may rightfully and at its discretion confer upon or withhold from corporations of its creation the exercise of lawful corporate powers and franchises, yet such conceded lawful exercise of power in the part of the state does not meet the exigencies of the present situation, for here complainants, both personal and corporate, are seeking no rights of franchise or privilege from the state. They are insisting on the right to transact no intrastate business of any kind or character. On the contrary, by their bills presented they expressly disclaim any such intention. What they do seek is to enter the state for the purpose of engaging in interstate business in a commodity the lawful subject of private ownership, or to transport without the state private property of which they are the lawful owners, now within the state, for the purpose of its sale and disposition, or to employ property owned by them in the state in interstate transportation; and in attempting to so do they are confronted by defendants, assuming to act under authority of the act in question, which, if valid, deprives them of that dominion over and right incident to the ownership of private property, which, as contended by complain-

ants, they may not lawfully be denied without just compensation made to them. And this leads us to inquire: What is property? And what constitutes such taking of private property as is inhibited by the constitutional provisions in question? The Century Dictionary defines the word "property" as follows:

> "The right to the use or enjoyment or the beneficial right of disposal of anything that can be the subject of ownership; ownership; estate; especially, ownership of tangible things.
>
> The word 'property,' as applied to lands, comprehends every species of title, inchoate or complete. It is supposed to embrace those rights which lie in contract, those which are executory, as well as those which are executed." *Soulard vs. United States,* 4 Pet., 511, 7 L. Ed., 938.

Mr. Justice Field, in *Slaughter House Cases,* 16 Wall., 36, 21 L. Ed., 394, said:

> "It is one of the privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit, without unreasonable regulation or molestation."

And again:

> "There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor."

The same learned justice, in *Munn vs. Illinois,* 94 U. S., 113, 24 L. Ed., 77, said:

> "By the term 'liberty,' as used in the provision, something more is meant than mere freedom from the physical restraint or the bounds of a prison. It means freedom to go where one may choose and to act in such

manner, not inconsistent with the equal rights of others, as his judgment may dictate for the promotion of his happiness; that is, to pursue such callings and avocations as may be most suitable to develop his capacities and give to them their highest enjoyment."

Mr. Justice Miller, in *Pumpelly vs. Green Bay Company*, 13 Wall., 166, 20 L. Ed., 557, said:

"It would be a very curious and unsatisfactory result, if, in construing a provision of constitutional law always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that, if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction, without making any compensation, because, in the narrowest sense of that word, it is not 'taken' for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which has no warrant in the laws or practices of our ancestors."

Mr. Justice White, in *Ohio Oil Company vs. Indiana*, 177 U. S., 190, 20 Sup. Ct., 576, 44 L. Ed., 729, says:

"On the other hand, as to gas and oil, the surface proprietors within the gas field all have the right to

reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right, which belongs to them, without a taking of private property."

Mr. Justice Field, in *Charlotte, etc., Railroad vs. Gibbs*, 142 U. S., 386, 12 Sup. Ct., 255, 35 L. Ed., 1051, said:

"Private corporations are persons within the meaning of the amendment. It has been so held in several cases by this court. *Santa Clara County vs. Southern Pacific Railroad Co.*, 118 U. S., 394, 6 Sup. Ct., 1132, 30 L. Ed., 118; *Pembina Mining Co. vs. Pennsylvania*, 125 U. S., 181, 189, 8 Sup. Ct., 737, 31 L. Ed., 650; *Minneapolis & St. Louis Railroad Co. vs. Beckwith*, 129 U. S., 26, 9 Sup. Ct., 207, 32 L. Ed., 585."

It is, again, the insistence of the defense should it be determined natural gas is in its nature such a product as to be susceptible of absolute individual, private ownership, with all rights incident to such ownership, including that of transportation, sale, and delivery, which rights are beyond the power of the state to take away without just compensation made to the owner, yet it is earnestly insisted the state in the exercise of its sovereign power of eminent domain may either grant or withhold the exercise of that power at will. Therefore it may, as it has done in this case, confer it on corporations of its own creation and deny it to all others, including the complainants.

The contention made, in so far as stated, we think sound beyond doubt. However, based on this well-established premise, it is further insisted by the defense that the fee to what is called the "public highways" in this state is vested in the state for the common benefit of the whole people. Therefore it is urged the state possesses the same power

and control over its public highways, to prevent the laying of natural gas mains along, over, or across them ordinarily possessed by cities over their public streets, alleys, and other public places; and as complainants are rightfully denied the exercise of the power of eminent domain to procure a right of way, and are rightfully denied by the act in question the right, privilege, or franchise of going upon, along, over, across, or under the highways of the state with their pipe lines, therefore the conclusion is drawn that whatever rights complainants may have acquired by virtue of private contract, or may in future acquire in such manner, yet as the state may lawfully withhold from or deny to complainants the use or occupancy of its public highways in any and all manners, it may lawfully and effectually block all endeavor on the part of complainants and all others to construct pipe lines designed or intended for the purpose of transporting natural gas from out the state, whether such gas be owned by complainants or others; and the cases of *St. Louis vs. Western Union Telegraph Co.*, 148 U. S., 92, 13 Sup. Ct., 485, 37 L. Ed., 380; *Western Union Tel. Co. vs. Penn. R. R. et al.*, 195 U. S., 540, 25 Sup. Ct., 133, 49 L. Ed., 312; *New Orleans Gas Co. vs. Louisiana Light Co.*, 115 U. S., 650, 6 Sup. Ct., 252, 29 L. Ed., 516; *New Orleans Water Works Co. vs. Rivers*, 115 U. S., 674, 6 Sup. Ct., 273, 29 L. Ed., 525; *Northwestern Telegraph Exchange Company vs. City of St. Charles* (C. C.), 154 Fed., 386, and many other cases, are cited in support of the conclusion stated.

Without either conceding or deciding the correctness of the result obtained by this process of reasoning, should the soundness of the premises on which it is based be conceded, as applied to the act in question, which has been found to have been designed and intended as an absolute prohibition on interstate commerce of a product the subject of exclusive, private ownership, with all the rights incident

to such ownership, including the right of sale, transportation, and delivery, yet we conceive the very postulate on which the logic employed is based is radically unsound in this:

The lands involved in these suits, and all lands within the jurisdiction of this court, comprised what was known as Indian Territory. The fee to the rural public highways in that portion of this state formerly comprising Indian Territory, and now the Eastern district, does not vest in the state for the benefit of the whole people, as premised by the defense; but it does vest in the abutting landowners. The public have only a perpetual servitude or easement therein, and the abutting landowner may use the highway for his own benefit and enjoyment in such manner as is not inconsistent with the superior rights of the public to pass over, maintain, and improve the easement granted; whereas, the public streets, squares, alleys, and other public places of cities of this country, as a very general rule, by act of public dedication by the owner and founder, pass to the city in its corporate capacity for the benefit of the public, absolutely in fee, for use, enjoyment, control, and disposition by the corporation. For this reason, in our judgment, the authorities cited by solicitors for the defendants do not apply.

It was the rule of civil law that the fee to public highways vested in the state. *Dunham vs. Williams*, 37 N. Y., 254; *Mitchell vs. Bass*, 33 Tex., 259; *Renthrop vs. Bourg* (La.), 4 Mart., (O. S.), 97; *Hatch vs. Arnault*, 3 La. Ann., 482; *Mendez vs. Dugart*, 17 Id., 171; *Bradley vs. Pharr*, 45 La. Ann., 426, 12 South., 618, 19 L. R. A., 647. It has ever been the rule of the common law that the fee of highways vested in the abutting landowners and not in the state. Mr. Justice Story delivering the opinion of the court in

United States vs. Harris, 1 Sumn., 21 Fed. Cas. No. 15,315, said:

> "The general principle of the common law is that the soil over which a street or highway is laid still remains the property of the original owner, subject to the easement."

Mr. Justice McLean, delivering the opinion of the court in *Barclay vs. Howell*, 6 Pet., 498, 8 L. Ed., 477, said:

> "By the common law the fee in the soil remains in the original owner where a public road is established over it; but the use of the road is in the public. The owner parts with this use only; for, if the road shall be vacated by the public, he resumes exclusive possession of the ground, and while it is used as a highway he is entitled to the timber and grass which may be grown upon the surface and to all minerals that may be found below it. He may bring an action of trespass against any one who obstructs the road."

These lands were, until recently, the tribal property of the Cherokee, Creek, Choctaw, Chickasaw and Seminole tribes of Indians, not subdivided by survey, and without legally defined public highways. Recently they have been surveyed, and by separate acts of Congress as to each tribe, based upon tribal agreements, have been allotted to the individual Indians in severalty, with a view to statehood, which soon followed. In these various acts of Congress provision was made for public highways. As to the Cherokee Nation, wherein lies the particular land involved in these suits, it was provided by Act Cong. July 1, 1902, c. 1375, Sec. 37, 32 Stat., 722:

> "Public highways or roads two rods in width, being one rod on each side of the section line, may be established along all section lines without any compensation

being paid therefor, and all allottees, purchasers and others shall take the title to such land subject to this provision."

Similar provisions were contained in the acts relating to the other nations, providing for public highways of various widths, but in each case providing that the allottees, purchasers, and others should take title to such lands subject to the highway rights therein provided for. It is clear, therefore, that the fee to the land comprising rural highways in what was formerly Indian Territory vests in the abutting landowners, subject only to the easement granted the public for highway purposes, following the rule of the common law.

It is unnecessary for the present consideration to determine the status of highways in that portion of the state which was formerly Oklahoma Territory; for while the laws in force in that territory at the time of the admission of the state into the Union, not repugnant to the Constitution and not locally inapplicable, were extended over the entire state, in our judgment nothing contained therein can be held to affect the status of the rural public highways under consideration, especially in view of the terms of the enabling act and the Constitution established pursuant thereto, even if it were conceded that a different condition with regard to title of rural public highways existed in Oklahoma Territory.

It being therefore determined the fee of the rural highways over the lands involved vests in the adjoining landowners, as in most of the other states of this Union, what are the rights of the owners of the fee therein? This question has many times received the consideration of the courts. In *Perley vs. Chandler* 6 Mass., 454, 4 Am. Dec., 159, Chief Justice Parsons, delivering the opinion of the court, said:

"But the soil and freehold remains in the owner, although incumbered with a way; and every use to

which the land may be applied and all the profits which may be derived from it consistently with the continuance of the easement the owner can lawfully claim. He may maintain ejectment for the land thus incumbered; and if the way be discontinued he shall hold the land free from this incumbrance. Upon these principles there can be no doubt but that the owner of the land can sink a drain or any water course below the surface of this land covered with a way, so as not to deprive the public of this easement."

In *Woodring vs. Forks Township*, 28 Pa., 361, 70 Am. Dec., 134, Chief Justice Lewis, delivering the opinion of the court, said:

"A man who owns the soil on which the public has a highway has a right to enjoy his property in every way that may promote his interest or convenience, so that he takes care not to injure the public easement. '*Sic utere tuo ut alienum non laedas*' is the maxim which applies in such cases. He might cut a passage across the road for the purpose of draining his land or leading water to his mill, because the land is his own and he may use it for all legitimate purposes."

In *Starr vs. Camden, etc., R. R. Co.*, 24 N. J. Law, 597, it was held by the Supreme Court of New Jersey as follows:

"This easement (of a public highway) does not comprehend any interest in the soil, nor give the public the legal possession of it. The right of a freehold is not touched by the establishing of a highway, but continues in the owner of the land, in the same manner that it was before the highway was established, subject to easement. This principle is so universally recognized that it would seem to be a work of superogation to

cite authorities to sustain it; hence the owner of the soil may lay water pipes, gas, or other pipes below the surface, may excavate for a vault or dig for mining purposes, and use it in any other manner that does not interrupt the free passage over it. He retains the full possession of it, subject only to the easement. He may fell the trees upon it, cut the grass, or depasture it."

In *Papworth vs. City of Milwaukee*, 64 Wis., 389, 25 N. W., 431, it was held:

"A lot owner, being the owner of the fee to the middle of the street, may construct vaults or other areas under the sidewalk, with opening in the walk, if this be done in such manner as not to interfere with or endanger public travel."

In *Commissioners of Shawnee County vs. Beckwith*, 10 Kan., 607, it was held:

"In this state the statutes provide for the establishment of public roads and highways; but both the Constitution and statutes are silent as to how much of the land, or what interest therein, shall pass to the public, and how much of the land, or what interest therein, shall remain with the original proprietor. Therefore we would infer that nothing connected with the land passes to the public, except what is actually necessary to make the road a good and sufficient thoroughfare for the public. The public obtains a mere easement to the land. It obtains only so much of the land, soil, trees, etc., as is necessary to make a good road. It obtains the right for persons to pass and repass, and to use the road as a public highway only, and nothing more. *Calkins vs. Mathews*, 5 Kans., 199, 200, and cases there cited. The fee in the land never passes to the public, but always continues to belong to the original

owner. He continues to own the trees, the grass, the hedges, the fences, the buildings, the mines, quarries, springs, water courses in fact everything connected with the land over which the road is laid out which is not necessary for the public to use as a highway. *Angell on Highways*, pp. 301 to 312, ch. 7, and cases there cited. He may remove all of these things from the road, or enjoy them in any other manner he may choose, so long as he does not interfere with the use of the road as a public highway. No other person has any such rights. In fact, the original owner has a complete and absolute domain over his land, and over everything connected therewith after the road is laid out upon it, as he had before, except only the easement of the public therein."

In *Overman vs. May*, 35 Iowa, 89, it was said:

"The fee therein being deemed to be in plaintiff, the public has no right other than to use the premises as a highway, than in the right to pass and repass thereon, and the incidental right to repair the same and keep it in proper condition for that purpose. There is no evidence, nor is it claimed in argument, that this use upon which the easement is claimed ever extended beyond this. The title to the land and all the profits to be derived from it, not inconsistent with and subject to the easement, remain in the owner of the soil. He owns all the trees upon it, all the mines and quarries under it. He has all above and under the ground, except the right of way in the public, which is a right of passage."

In *Woodruff vs. Neal*, 28 Conn., 167, Chief Justice Storrs, delivering the opinion of the court, said:

"It is well established in this state, in conformity with the process of the common law, that a highway is

simply an easement or servitude conferred upon the public in regard to the right to pass over the land on which it is laid out, and an incident of such right that all use of soil and materials upon it in a reasonable manner for the purpose of making and repairing it. The title of the owner of the land is not extinguished, but is simply so qualified that it can only be enjoyed subject to the easement. He retains all the rights of property in the soil not incompatible with the public enjoyment of the highway, and, whenever the highway is abandoned or lost, the entire and exclusive and unincumbered enjoyment reverts to him. Subject to this right of the public, he may take trees growing upon the land, sink water courses under it, and has a right to every use and profit that can be derived from it, not inconsistent with the easement, and, if disseised (as he may be), can maintain ejectment, and recover possession subject to the easement. He can also maintain trespass for any act done on the land not necessary for the enjoyment of the easement, which would be actionable injury if the land was not covered by a highway."

See, also, on this subject, *Cooley on Torts* (2d Ed.), 372; *Jones on Easements*, sections 478, 479; *Washburn on Easements*, 252; *Kent's Commentaries*, 432; *Elliott on Roads and Streets*, 519.

From this examination of the subject it must be clear, as complainants do not seek to perform any public service for the state, or for any city or town within the state, calling for the use of the streets, alleys, and other public places, or for a contract right in the nature of a franchise to conduct such business, but seek only a right of way for the purpose of laying down and maintaining pipe lines for the transportation of natural gas from within to without the

state in interstate commerce, for which no franchise is either necessary or desired, they are at liberty to procure such right of way by private contract, and conduct such operations in a lawful manner, under such reasonable rules and regulations as to inspection and manner of operation, as the state may justly impose.

It is not intended, by anything said in the course of this opinion, to either hold or intimate the state does not possess the power to supervise, control, and regulate in a reasonable manner the method of construction and manner of laying and maintaining pipe lines to be employed in the transportation of natural gas in interstate as well as intrastate commerce, for the purpose of preserving the health and promoting the safety of its citizens and safeguarding the public against accident which may result from the conduct of a business in which a highly inflammable, dangerous, and volatile product is transported. This right of reasonable inspection, supervision, and control, commensurate with the attendant danger, the state has and should exercise in its reserve police power. What we do say, and intend to be understood as saying and meaning, is this: All such regulations must be reasonably adapted and necessary to accomplish the end sought, and the result or end sought to be attained must be such as falls within the scope of the power residing in the state. It must not be employed under disguise for the purpose of prohibiting, regulating, or controlling a proper subject of interstate commerce, for the exclusive power of regulating interstate commerce resides in the Congress under the commerce clause of our national Constitution.

Again, it must not be exerted in disguise for the purpose of denying any person within its jurisdiction the equal protection of the laws, or deny any such person his just

property rights without due process of law. Any such state enactment violates the fundamental law of our country, and of this state as well, and must be and will be declared inoperative and void at the suit of the parties injured thereby. As said by Mr. Justice Harlan, in *Connolly vs. Union Sewer Pipe Company*, 184 U. S., 540, 22 Sup. Ct., 431, 46 L. Ed., 679:

> "The question of constitutional law, to which we have referred, cannot be disposed of by saying that the statute in question may be referred to what are called the 'police powers' of the state, which, as often stated by this court, were not included in the grants of power to the general government, and therefore were reserved to the states when the Constitution was ordained. But as the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the states to the contrary notwithstanding, a statute of a state, even when avowedly enacted in he exercise of its police powers, must yield to the law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived. 'The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law.' The state has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health, and the public safety; but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to person within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void. *Gibbons vs. Ogden*, 9 Wheat., 1, 210, 6 L. D., 23; *Sinnot vs. Davenport*, 22 How., 227, 16 L. Ed., 243; *M., K. & T. Ry. Co. vs. Haber*, 169 U. S., 613, 18 Sup. Ct., 488, 42 L. Ed., 878."

Or as said in *Ritchie vs. People,* 155 Ill., 98, 40, N. E., 454, 29 L. R. A., 79, 46 Am. St. Rep., 315:

> "But it is claimed on behalf of the defendant in error that this section can be sustained as an exercise of the police power of the state. The police power of the state is that power which enables it to promote the health, comfort, safety, and welfare of society. It is very broad and far-reaching, but is not without its limitations. Legislative acts passed in pursuance of it must not be in conflict with the Constitution, and must have some relation to the ends sought to be accomplished; that is to say, to the comfort, welfare, or safety of society. Where the ostensible object of an enactment is to secure the public comfort, welfare, or safety, it must appear to be adapted to that end. It cannot invade the rights of person and property under the guise of a mere police regulation, when it is not such in fact; and where such an act takes away the property of a citizen, or interferes with his personal liberty, it is the province of the courts to determine whether it is really an appropriate measure for the promotion of the comfort, safety, and welfare of society. *Lake View vs. Rosehill Cem. Co.,* 70 Ill., 191, 22 Am. Rep., 71; In *re Jacobs,* 98 N. Y., 98, 50 Am. Rep., 636; *People vs. Gillison,* 109 N. Y., 389, 17 N. E. 343, 4 Am. St. Rep., 465."

It follows, from what has been said, in our judgment, the act in question, viewed in its true light, as one enacted for the express purpose of forever prohibiting the interstate transportation of natural gas through means of pipe lines from out this state, impinges on the rights of complainants as disclosed by their several bills of complaint, as those rights are guaranteed and protected by our national Constitution, and that of the state as well, in that the act in ques-

tion attempts to prohibit commerce among the state in property capable of absolute private ownership, with all its incidents, and susceptible of being so transported, and such prohibition violates the commerce clause of our national Constitution, and in that the sole, dominant purpose of the act, as construed above, if enforced against complainants, invades their rights as guaranteed by the fourteenth amendment to the national Constitution, and section 24 of article 2 of the Constitution of this state. In this view of the case, the remaining objections made by complainants to the validity of the act need not be here considered.

It must therefore be held, and is held, in so far as the act in question attempts to prohibit the transportation of natural gas by the complainants in interstate commerce through means of pipe lines constructed for that purpose, or attempts to prohibit complainants from employing their property in interstate commerce, or from engaging in the business of interstate commerce in natural gas, under such reasonable rules and regulations as the state may impose, and the nature of the business transacted may demand for the health and safety of the citizens of the state, it is unconstitutional, void, and beyond the power of the state to enact; that these suits are not in truth and fact against the state in its sovereign capacity, in violation of the eleventh amendment to the national Constitution, but were brought and are maintained as against defendants, officials of the state, assuming to act in pursuance of authority conferred by the act in question, which is beyond the constitutional power of the Legislature of the state, to the threatened injury and damage of complainants in their property rights; and therefore they may maintain these suits.

It is deemed proper to here state the Supreme Court of the state of Indiana arrived at the same conclusion here

reached by us on consideration of an act of the Legislature of that state which in express terms prohibited that which is here attempted to be prohibited by indirection. See *State ex rel. Corwin vs. Indiana & O. Oil, Gas & Min. Co.*, 120 Ind., 575, 22 N. E., 778, 6 L. R. A., 579.

And we may be permitted to further remark: Would it not be most singular, indeed, to record in our national history and transmit to generations of readers yet unborn the fact that Oklahoma, rich, not alone in material wealth and natural resources, but in her splendid citizenship, on the very year in which she was admitted into this Union on terms of perfect equality and unity, there to rest forever in peace and safety, free from internal strife and external violence, permitted to participate in the counsels of this great nation and to partake of its benefactions, permitted to share on equal terms with her sister states in that pride of memory of the noble souls who redeemed this land from the wilderness and kept it free from the hand of the oppressor, of those matchless intellects who conceived and fashioned our form of government, and guided it safely through the trials and perils incident to the establishment of the first enduring representative republic the world has ever known, of those heroic spirits who died that this nation might live, one and inseparable, and that the principles of free government might not perish from the earth, permitted, on her own invitation, to share in the grandeur of its national accomplishments and the magnificence of its international power—that this great state would, even though she could, not out of her poverty or necessity, but out of her abundance of mineral wealth, lock herself up as within a self-imposed Chinese Wall, and thus refuse to share in her plenty and exchange nature's benefactions with her sister states, in return for the many favors conferred on her by the nation? May it not be justly and timely inquired: What has become of our

vaunted Western hospitality and our boasted Southern chivalry? For in Oklahoma, more than in any other state of this Union, West and South unite. We conceive the fulfillment of the design here attempted to be neither within the limits of possibility of accomplishment under the Constitution and laws of our common country nor the end sought desirable to the state, even if accomplished.

Therefore let the demurrers interposed by the defendants be overruled, with such leave to plead over, if so advised by their solicitors, as may be granted by the presiding judge of this court in his order; and, further, let the provisional injunctions applied for by complainants be granted on such conditions as to bonds as may be determined by the judge of this court.